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HANDBOOK

OF THE

LAW OF EVIDENCE

SECOND EDITION, REVISED

By JOHN JAY McKELVEY, A. M., LL. B.
Of the New York Bar;
Author of "Common Law Pleading," etc.

ST. PAUL, MINN.
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1907

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M'KELV.EV.(2D ED.)

PREFACE TO SECOND EDITION.

At the request of the publishers, the author has endeavored to find time for a re-examination of the subject of Evidence, and a revision of his treatment of it as found in the first edition of this work prepared in 1897.

The principles do not change materially in a decade, but added experience and a different point of view may in some instances result in a more satisfactory statement of them.

The changes in this second edition are not many, although there have been re-arrangement and additions in most of the chapters and some, notably the chapter on Judicial Notice, which has been re-written, and the chapters on Burden of Proof, Presumptions, Admissions and Writings, which have been enlarged, present the respective subjects of which they treat in somewhat different form from the corresponding chapters of the first edition.

The aim has been to avoid a compilation of cases, and while many thousands, decided since 1897, have been examined, comparatively few have been added as citations.

The purpose of the work is now, as it was in the former edition, to give a statement of principles with illustrations of their application, and some discussion of the manner of their development; the work will, therefore, serve better one who seeks light upon the law of Evidence viewed as a science than one who seeks a precedent for some particular case.

The author, therefore, again disclaims any attempt to present the law of all the States or of any one of them, and has cited cases from the different jurisdictions indiscriminately, looking only to their value as illustrations of the application of those principles which seem to him to be at the foundation of an intelligent understanding of the law of Evidence.

J. J. M.

Dated, New York, June, 1907.

PREFACE TO FIRST EDITION.

The present treatise is the embodiment of an attempt to restate the principles of the law of evidence in a manner easy of comprehension for the student, and, for the practitioner, easy of application. If the result, while avoiding the meagerness of Stephen's Digest, on the one hand, and the unwieldy fullness of detail characteristic of some of the larger works, on the other, possesses a reasonable degree of clearness, it will have accomplished somewhat of that which was intended.

The application of the principles of the law of evidence has become so large as well as so important a part of the work of the courts, and the pressure under which questions relating to such application must be determined has become so great, that judges and lawyers must needs have a systematic idea and ready knowledge of the main principles of the law, in order to meet the emergencies of their work. For every instance where time is obtainable to examine and discuss at length a question of evidence arising in the courts, there are a hundred instances in which quick decision is imperative.

The conditions under which the courts of to-day have to deal with the law of evidence, coupled with the extraordinary volume of business transacted by them, and the consequent multiplication of questions involving the application of the same principles, have resulted in a tendency to simplify and systematize the statement of the law, and to get rid of much of the old-time verbiage, as well as of many obsolete ideas. The courts are to-day more a part of the people, and in touch with their social and business life. They are, by reason of this, more prone to deal with the affairs of the people in accordance with the usual business and social standards, and, in matters of evidence especially, to rely upon the methods of thought and processes of reasoning which form the ground for action among business men.

The form of treatment of the subject which has been adopted in the following pages finds its reason quite as much

in the tendency above referred to as in the desire to make the work of especial use to students.

Acknowledgment is due, and freely given, to that admirable collection of cases on the subject of evidence compiled by Prof. Thayer, of the Harvard Law School, upon which the author has drawn for very many of the illustrations cited, and to which he has very generally referred for the early cases. If the cases cited be found to be fewer than in most works on the same subject, it may be ascribed, in part at least, to the fact that an endeavor has been made to avoid massing together quantities of cases having a similarity to each other, but not relating specifically to the question under discussion.

J. J. M.

November 28, 1897.

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HANDBOOK

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SECOND EDITION.

CHAPTER I.

INTRODUCTORY.

1-3. Place of Evidence in the Law.
4-5. "Evidence" and the "Law of Evidence" Distinguished and Defined.
6. Origin of the Law of Evidence.
7. Functions of Court on a Trial.
8. Rules of Evidence Secondary to the Pleadings and Rules of Substantive Law.
9-10. Judicial Notice and Admissions as Factors in Arriving at the Facts of a Case.

PLACE OF EVIDENCE IN THE LAW.

1. A law is a rule of human action.

2. The law, as a system, consists of a large number of such rules, which have had their origin in universal recognition, in the decisions of courts, the action of the sovereign power, or the action of legislative bodies. They may be separated into two classes:

(a) Rules of substantive law, which prescribe or define the rights and obligations of men;

(b) Rules of adjective law, which relate to the means of enforcing rights and obligations.

3. The law of evidence is a part of the adjective law.

The Law as a Body of Rules.

A clear understanding of the relation of any particular branch, such as the law of evidence, to the main body of the

law, depends upon a proper conception of what law is. A commonly accepted definition of "law" is, "A rule of human action prescribed and promulgated by sovereign authority, and enforced by sanction of reward or punishment." [1] This is not an accurate definition of the law as a whole. The law, as a part of the social system under which we live, is made up of a vast number of rules of human action. Not all of them have been prescribed and promulgated by sovereign authority. On the contrary, many have found their origin in certain qualities of the human mind common to all mankind, and have been established by the voluntary recognition which they have received at the hands of all members of the human race. These rules are those which relate to man's fundamental rights respecting his own person and property.

Beginnings of the Substantive Law.

Wherever the human race has existed, and under whatever conditions,—whether it has been as some savage tribe in the heart of Africa, or as the most enlightened community of modern times,—the distinct personality of its members has always been prominent. Man is, above everything, an individual. However he may combine for protective, social, or commercial purposes, it is the distinct personality of the individual which is seen in all the relations which are established.

In this fact, that man is an individual complete in himself, and not a component part of some larger personality, lies the idea which distinguishes between "mine" and "yours"—the idea of ownership. This idea, implanted in man as a part of his nature, is at the basis of all law. Upon it the whole system rests. Rules which have from the inception of the human race governed human action are developments of this idea. These rules made up a large part of the law of primitive peoples. They were rules which expressed general rights with respect to person and property, broad principles which needed no lawmaking power to establish them, but which were universally recognized as necessary to the existence of any intercourse between individuals.

I have a right to defend my person from injury, and to enjoy, without interference, my property. This is because they

[1] Best, Ev. § 1.

are mine; because, from the relation in which they stand to me, the mind conceives in respect to them the idea of ownership. Stated in the form of rules, we might say, (1) every person may defend his person from injury; (2) every person may enjoy his property without interference. These are rules of human action everywhere recognized and relied upon. They are laws, and were in the beginning the law. Perhaps it was not long before they were qualified, explained, amplified, and developed by means of numerous other rules, but in the beginning they constituted the law.

Development of the Substantive Law.

It certainly could not have been long after intercourse between human beings began before the question arose as to what makes property A.'s, instead of B.'s, and undoubtedly general recognition of certain rules as to the ownership of property soon came about. For instance, it was probably not long disputed that what A. subdued from a wild state, or reduced to his possession, or made with his hands, belonged to A., in preference to B. It may soon have become established that if A., by gift or exchange, put B. in possession of that which had formerly been his (A.'s), it then became B.'s, in preference to C.'s. It must soon have been recognized that A.'s right to defend his person from injury was qualified by the rule that he must not himself interfere with the person or property of B., and that, if injured while so doing, he could claim no redress.

The two general rules relating to the enjoyment of person and property, unless they were thus amplified, would avail man little. While it is true that all men, under normal conditions, instinctively recognize these rules in their general application to the relations between them, yet the conditions under which men act are so often not normal, and the chances of a clashing of rights are so great, that if the law were expressed in these two general rules, with no subsidiary rules to explain, define, and limit their application, men would be constantly in uncertainty as to the effect of their actions.

Such subsidiary rules are a part of the law. They are rules of human action, and have become a part of the law because

the varying relations between individuals in business and social life have demanded them. They have come slowly and been grafted into the law one by one, sometimes by the common recognition of men, later, it may be, finding a definite expression in the decisions of courts; sometimes put forth in the first instance by the courts; sometimes established by legislative bodies. Together they make up the body of law which defines the rights and obligations of men; that which is known as the "substantive law."

Development of the Adjective Law.

It must not be supposed that this mass of rules alone constitutes the law as it exists to-day. A., being the stronger, might injure B.'s person with impunity, and B. be powerless to defend himself, or A. might trespass upon B.'s land, and, defying B., remain a trespasser during his own pleasure, were it not that means exist by which B. can enforce his rights in respect to his person and property. So, too, a piece of property—a horse, for example—claimed by both A. and B., might go to the stronger, though not the one rightfully entitled to it, were it not for such means. In fact, the rules defining the rights and obligations of men, however complete and perfect they might be, would be of little use to mankind, unless there existed the means of compelling men to conform their actions to them, or of inflicting punishment upon them for failure to do so.

So it happens that, with the growth of the substantive law, another kind of law has been established, which relates, not to the rights and obligations of men, directly, but to the means of enforcing them. This is the law which defines the nature and powers of judicial tribunals, and then prescribes the methods of procedure therein. This is known as the "adjective law."

Division of Law into Separate Branches.

The rules both of substantive and adjective law have attained such vast proportions that, for convenience in explaining and discussing them, they are generally grouped into classes according to the nature of the subject-matter to which they relate. Each class is then spoken of by itself, as the law of the particular subject to which it relates; as the "law of torts,"

the "law of contracts," the "law of evidence," and the like. What each subject includes is dependent largely upon the conception of the particular writer handling it, for there is no well-defined dividing line between many of the subjects.

Evidence in Its Relation to the Adjective Law.

The adjective law includes all the laws which have built up the judicial system, whether they have had their origin in the constitution, the legislature, or the courts. It embraces, too, the laws which have fixed the practice in the courts,—the methods of carrying on the work by judge and jury; the laws prescribing the manner in which litigants must seek relief and carry on their cases are also included; and, finally, certain rules have grown up, as a part of this law, which relate, not to the machinery of the system, but, having regard to the imperfections of the machinery, are concerned with sorting out and selecting the materials which are supplied to it. These last-mentioned rules make up the law of evidence.

The laws defining the nature and jurisdiction of the different courts, and the pleading and practice therein, fall easily into their several places in the general scheme of the law. Other parts of the adjective law, and notably the law of evidence, are not so easily disposed of. This is not because there is not a distinct dividing line between the law of evidence and the rest of the law, but because, while maintaining the use of the term "law of evidence," it has been sought to include, for purposes of convenience in the treatment of the subject, other matters more or less connected with, but yet not a part of it. There can be no forcible objection to the treatment of the law of evidence with such other matters, and in fact there may be a distinct and practical advantage in it.

"EVIDENCE" AND THE "LAW OF EVIDENCE" DISTINGUISHED AND DEFINED.

4. The word "evidence" means any matter of fact from which an inference may be drawn as to another matter of fact. The former fact is called the "evidentiary" fact; the latter, the "ultimate," "main," or "principal" fact.

5. The law of evidence relates to the use of evidence before judicial tribunals, and, in its proper significance, consists of

(a) Certain rules as to the exclusion of evidence, and

(b) The rules which prescribe the manner of presenting evidence in the courts.

Properly speaking, the law of evidence embraces those rules which, by statutes or the decisions and practice of courts, have been established to govern the use of evidence by the courts in the administration of justice. We are thus at once driven to a definition of the word "evidence."

Inference as the Determining Feature of Evidence.

What, then, is evidence? Perhaps the best and simplest definition is that it is any matter of fact from which an inference may be drawn as to another matter of fact.[2] Starting

[2] Bentham, in his Rationale of Judicial Evidence (volume 1 [1827] p. 17), seems to have been the first to define "evidence" in this manner. His language is: "Any matter of fact, the effect, tendency, or design of which, when presented to the mind, is to produce a persuasion concerning the existence of some other matter of fact; a persuasion either affirmative or disaffirmative of its existence." Prof. Thayer (3 Harv. Law Rev. 143) substantially follows Bentham's idea, but narrows the scope of the word to "any matter of fact which is furnished to a legal tribunal * * * otherwise than by reasoning or a reference to what is noticed without proof, * * * as the basis of inference in ascertaining some other matter of fact." The broader definition seems the more accurate, as the incident of any given fact being furnished to a legal tribunal in no sense affects its nature as an evidentiary fact. It is or is not evidence of another fact, according as it tends, or not, to produce in the mind an inference as to such other fact. The earlier works on the subject (Gilbert [1756, 1795]) seem to have found no need for defining the word. Swift (Evidence [1810] p. 1) says, "Evidence is what demonstrates, makes clear, and ascertains to the triors the truth of the facts put in issue," which is practically the same as Blackstone's definition (book 3 [1772] p. 367, c. 23). Morgan adopts Blackstone's definition. Essays [1789] vol. 1, p. 5. In Trials per Pais, by Duncomb (volume 2 [1766] pp. 347, 348), Lord Coke's definition of the word is adopted, which is as follows (1 Coke, Inst. 283a): "Evidence, 'Evidentia.' This word in legal understanding doth not only contain matters of record, as letters patent, fines, recoveries, enrollments, and the like; and writings under seal, as charters and deeds; and writings without seals, as court rolls, accounts, and the like,—which are called ev-

with this definition of "evidence," we have a basis upon which to work. What, then, is the relation of evidence to the law, that we need concern ourselves with a law of evidence? It is plain that a very great part of the knowledge upon which we base our actions is derived from inferences. There are several ways of telling whether my morning coffee is hot. I may apply it directly to my sense of feeling, in which case the sensation of heat results, and convinces the mind without process of inference. I may, however, not touch the coffee, but only observe the vapor arising from it, in which case I am equally well satisfied that it is hot, but inference has played an important part. I have inferred that it is hot because experience has taught me that, in similar cases where I observed the vapor arising, upon touching the coffee the sensation of heat resulted. On this experience I base an inference, from the fact that vapor arises, that the coffee is hot. I may neither touch nor see the coffee, but may hear it boiling on the stove. Previous experience having taught me to connect the sound with the presence of heat in the liquid, I infer from the sound that heat is present this time. To go a step further, I may ask X. to tell me what he knows about the coffee, and X., having

idences 'instrumenta'; but in a larger sense it containeth also testimonia, the testimony of witnesses and other proofs to be produced and given to a jury for the finding of any issue joined between the parties." Stephen seems to have found the basis of his definition in this, as he says: "'Evidence' means (1) statements made by witnesses in court under a legal sanction, in relation to matters of fact under inquiry; (2) documents produced for the inspection of the court or judge." But he omitted in his first subdivision what Coke was careful to add to his corresponding subdivision, "testimony of witnesses and other proof." The words "other proof" may cover just those kinds of evidence, namely, objects presented to the senses of the tribunal—real evidence—which Prof. Thayer criticises Stephen for failing to include in his definition. Thayer, Cas. Ev. (2d Ed.) p. 2, note 1. We then have that other style of definition adopted by Starkie (1828), Greenleaf (1842), and Taylor (1848), of which, perhaps, Taylor's is the most accurate, since it considers the word in its relation to law only, and excludes argument, while Starkie does not do the former, and Greenleaf does not do the latter. Taylor's definition is as follows (Tayl. Ev. 1): "The word 'evidence,' considered in relation to law, includes all the legal means, exclusive of mere argument, which tend to prove or disprove any matter of fact, the truth of which is submitted to judicial investigation."

been in the kitchen, and seen the coffee poured into the cup, and seen the cook take hold of the cup and suddenly jerk away her hand, may relate this circumstance to me. With this fact as a basis, and having neither touched, seen, nor heard the coffee, I, at once, by process of inference, am impressed that the coffee is hot.

So it is with the most unimportant facts in our daily life as it is with the greater issues. Inference, or determining the state or existence of one fact by another, is the staff of the mind.

Every fact which is the basis of an inference is evidence, and is thus frequently termed an "evidentiary" fact, while the fact which is inferred from it is called the "ultimate" or "principal" fact.

The law has to do with evidence because, in its tribunals, it has to do with facts in order to apply and enforce its rules, —facts which are disputed, and the existence or nonexistence of which must be determined. If A. charges B. with having interfered with his (A.'s) property by tramping across it, this fact must be determined. It is determined by means of the submission of facts from which the tribunal may draw inferences as to whether B. did or did not commit the trespass. These facts are evidence.

ORIGIN OF THE LAW OF EVIDENCE.

6. The law of evidence has developed out of

(a) Certain old ideas as to the nature and capacity of the jury;

(b) A regard for the shortness of human life, and the volume of business to be transacted by the courts;

(c) Certain other considerations of policy.

Susceptibility and Ignorance of the Jury as Factors in the Development of Excluding Rules.

In the submission of the facts which, as above explained, constitute the evidence in a case, there have been embarrassments, real and imaginary, which have resulted in the development of a set of rules. These rules relate to the use of such facts in court as evidence, and make up the "law of evi-

dence." The embarrassments referred to may be attributed, in the early stages of the law, mainly to the jury—the one feature of our judicial system in which it differs from all others. The jury, from the time it began to take on the character of an arbiter of the facts, must have been a disturbing element in the work of the court. It was an uncertain quantity, which, in the eyes of the judge, needed to be guarded against.

When the jury existed merely as a body of witnesses, supposedly familiar with the facts, who from their own knowledge stated what the facts were,[8] the court could, in the application of the law to the facts, exercise a control over the result which was impossible when the character of the jury changed. With the development of the jury into a reasoning, inference-drawing body of men, possessing the power to determine the ultimate facts in issue, and by their verdict to judicially settle the controversy, the situation, to the mind of the judge, was full of embarrassments. To what conclusions might not these men come; men ignorant of the law and its methods, unfamiliar with the ways of counsel, open to the influence of testimony and argument presented solely for the purpose of playing upon their sympathy, passion, and prejudice. This was a situation to be deplored, and to be relieved of its dangers as far as possible.

Accordingly, with the beginning of the use of evidence before juries, we find the beginnings of the law of evidence. Statements to which the courts might listen with impunity were carefully kept from the jury by excluding rules, established by the judges.

It must not be supposed that these excluding rules came into being all at once. The development of the jury into its final shape was a gradual one; and the growth of rules governing the use of evidence before the jury was equally gradual. It is immaterial to inquire here as to the kind of evidence which was excluded; that forms the subject-matter of the later chapters in this work. It is sufficient to say that, in general, everything except what was actually within the personal knowledge of the witness was considered unsafe to put before the jury. Thus, hearsay and opinion were both objectionable. In

[8] Bushell's Case, Vaughan, 135, 142, 147–149.

this way the susceptibility of the jury played its part in molding the law of evidence into its modern form.

The supposed ignorance of the average jury was also an important factor in the evolution of the rules of evidence. Things likely to complicate the case, to confuse the mind, or mislead as to the real facts in issue were accordingly excluded.

Limitations of Time.

With the expansion of the work of the courts and the ever-increasing volume of business brought before them, a necessity arose for the shortening of trials and the expediting of the work in every possible way. This influence was a powerful one in its effect upon the admission of evidence. Much that was logically relevant, and indeed worthy of consideration, if minute inquiry were possible, became inadmissible, upon the theory that it was too remote, or of slight importance. Collateral matters these were in the main,—matters likely to lead to prolonged collateral inquiry, with a meager result in the way of inference-compelling proof when finished.

Other Factors.

Other things operated to make it easy and natural for the courts to establish rules relating to the use of evidence. The policy of the law in respect to persons charged with wrongs, which extends to them the extreme limit of fairness, is responsible for the growth of an important class of excluding rules. Such rules shut out from the consideration of the jury any facts bearing upon character or habit; and this, although in many instances previous character would be logically a most important piece of evidence from which to infer the truth as to the facts in issue.

We may thus get some idea of the elements which have for centuries been at work molding forms into which matters of evidence for judicial tribunals must be cast, building barriers within which they must be confined, and wearing grooves along which the wheels of judicial inquiry must run.[4]

[4] How important a part the jury played in the development of the law of Evidence may be realized when one considers such a decision as that in Bell v. Walker, 54 Neb. 222, 74 N. W. 617, where it was held that the admission of improper evidence in a case tried without a jury is not ground for reversal, and every practitioner is

FUNCTIONS OF COURT ON A TRIAL.

7. In the trial of a case, it is the office of the court to decide:
(a) What facts constitute the case;
(b) What other facts properly belong to the case, as evidential of such main facts; and
(c) In what manner both the main facts and the evidential facts may be presented.

In the conduct of a trial and the performance of these offices, the court is governed by the rules of evidence; but it is also governed by rules of substantive law, rules of the law of procedure and pleading, and rules relating to functions of the court not classified under any of these heads. It is important to distinguish the rules of evidence from the other rules mentioned.[5]

Law of Evidence Will Not Determine What Are the Main Facts in a Case.

With the first function of the court, the law of evidence, obviously, has nothing to do. There is no principle of evidence upon which the court can determine what are the main facts which constitute any given case. The nature of the wrong alleged and of the remedy sought, and the substantive law, i. e., the law which defines the rights and obligations of mankind in respect to such wrong and remedy, must govern the court in the exercise of this function.

Having determined what are the main facts—upon the existence or nonexistence of which depends the relief to which the parties are entitled, and which facts, in a large sense, constitute the case which is before the court—the next step is to determine which of these facts are in dispute between the parties; i. e., what are the facts which constitute the case at issue.

familiar with the custom prevailing, where cases are tried before the judge alone, or a referee, of taking little account of the ordinary rules of evidence.

[5] In an article on the present and future of evidence (12 Harvard Law Review, 71) Prof. James B. Thayer very ably discusses some of the weaknesses of our present system, and makes some very valuable suggestions as to the enlargement of the functions of the court upon jury trial.

Here, again, there is, strictly, no principle of evidence which will help the court. Two factors enter into the question: First, the pleadings; second, the duty of the court to take certain facts as true, and its right to take certain other facts as true.

The determination from the pleadings of what facts are at issue between the parties has to do with procedure, and not with evidence. The successive pleadings in a cause were designed to eliminate from the controversy all facts about which there was no dispute, and the rules which must govern the court in its examination and construction of the pleadings are outside of the law of evidence.[6]

Those main facts which go to make up the case, and which are not put in issue by the pleadings, are taken by the court as true, upon the principle that the court will not make any inquiry into the truth of facts about which there is no dispute. If the parties are willing that a controversy between them should be decided upon the theory that certain facts are true, there is no injustice done, even though such facts are not true.

The facts in issue are narrowed down still further by that principle of the administration of our judicial system which in respect to certain matters requires, and in respect to other matters permits, the court to take judicial notice. With these facts, and with the doctrine of judicial notice, the law of evi-

[6] It may be noted that, given certain pleadings, and the court after an examination having determined that certain facts in the case are admitted, the admission, if expressly contained in a pleading, may have the same evidentiary character as an admission outside of the pleadings, proof of which is introduced at the trial. To illustrate, suppose A. brings an action against X. for breach of contract; the fact of the existence of the contract is one of the main facts in the case. Suppose X., in his answer to A.'s complaint, expressly admits the existence of the contract. The fact, then, is not in issue; it is already established. The admission is a fact which is before the court, and from it there is a logical inference that the contract existed. In this light, an admission in a pleading is evidence; but, after all, in determining the question of whether or not a fact is to be taken as true on the pleadings, the evidentiary character of the admission is not what governs. The court might know in its private capacity that no such contract (to use the illustration cited) in fact did exist, and yet be bound to take the statement of its existence as true.

dence has nothing to do. Yet the doctrine is so related to the law of evidence that it is convenient to take it up in connection with that subject, and it will be noticed more fully in a separate chapter.

How the Law of Evidence is Connected with the Determination of the Evidentiary Facts.

We come now to the second function of the court in respect to the trial—the determination of what facts other than the main facts in issue may be proved, as evidential of the main facts. In this determination the court is concerned more or less with the principles of the law of evidence, but it is also concerned with some other things.

The first condition which a fact, proof of which, as an evidentiary fact, is offered, must fulfill, is that it must be evidential of the main fact. It must furnish a basis from which the main fact can be inferred. The first duty of the court is to apply the underlying principle of the law of evidence, namely, logical relevancy, for the purpose of determining whether or not the fact offered can be evidence. If the fact meets this test, it may or may not be admitted. For flanked around the general principle in the law of evidence, that what is logically relevant is admissible, are numerous excluding rules, which say that this or that fact, though logically relevant, is inadmissible. The jury, as a feature of our judicial system, is responsible for the existence of many of these rules, though each has its own peculiar principle upon which it is founded. These rules, and their application, form a large portion of the law of evidence.

A fact may, however, be logically relevant, and subject to none of the excluding rules, and still be inadmissible, by reason of some rule of substantive law which says that it cannot be shown. In applying such a rule, the court is not applying any rule of evidence, and in this respect the exercise by the court of its function in respect to evidentiary facts has nothing to do with the law of evidence.

Law of Evidence Prescribes the Manner of Proving both Main and Evidentiary Facts.

If the fact sought to be proved is one of the main facts in issue, or is a fact which is evidentiary, and at the same time

subject to none of the excluding rules which would make it inadmissible, the next consideration is as to the manner in which it may be proved. The court, in the exercise of its function in this respect, is applying those principles of the law of evidence which "prescribe the manner of presenting evidence, as by requiring that it shall be given in open court, by one who personally knows the thing to be true, appearing in person, subject to cross-examination, or by allowing it to be given by deposition taken in such and such a way," and fixes "the qualifications and privileges of witnesses, and the mode of examining them." [1]

RULES OF EVIDENCE SECONDARY TO THE PLEADINGS AND RULES OF SUBSTANTIVE LAW.

8. The rules of evidence do not come into service until it has been determined by other means what are the actual facts in dispute between the parties,—the "facts in issue." The "other means" referred to are the pleadings, and the rules of substantive law applicable to the particular case.

Every case, it has been said, is merely a collection or state of facts. A perfectly truthful and accurate statement of the circumstances out of which, by reason of some principle of law, it is claimed a liability arises in favor of the plaintiff and against the defendant, would be what might be called a perfect case. If there were a means of presenting such a statement to the court, juries would no longer be of use, witnesses would be unknown, and there would be no law of evidence. Litigants would simply receive from the court an interpretation of the principles of law as applicable to each particular state of facts presented. Unfortunately, however, this condition of things is impossible, for the reason that men are fallible, with imperfect memories, and even likely to have their perceptions colored by passion and prejudice, so that two accounts by different persons who have seen the same occurrences under precisely the same physical conditions seldom agree.

[1] Thayer, Cas. Ev. (2d Ed.) p. 2.

The "perfect case" is the goal for which the courts strive, and the nearer they can get to that the more complete justice can they render. In the process of getting at the facts which constitute the case, there are several distinct steps which may properly be considered here.

In the first place, let it be understood that no tribunal or court composed of men is omniscient or omnipresent, and therefore, as it cannot be everywhere and see and know everything, we may start with the theory that it knows nothing except the principles of the law; that all facts to which it is asked to apply the law must in some way be placed before it. With the means by which this is to be done, we are now concerned.

First. The court must be acquainted with all the facts making up the combination upon which the plaintiff claims that he is entitled to have some principle of law applied in his favor. These are presented by a statement to the court made by the plaintiff.

Second. It must be acquainted with all the explanatory facts which the defendant desires to offer as showing that there is no case for the application of a legal principle against him. This is done by a statement made to the court by the defendant.

Third. It must be told what facts presented by the plaintiff the defendant admits to be true, and vice versa; for the court will not spend its time in searching out the truth or falsity of facts which both parties are agreed upon. Justice is done between them if the facts are taken to be what both of them are willing to admit. Each party, in his statement or statements to the court, may deny any fact which the other has stated, and the court proceeds upon the assumption that this will be done. At any rate, it takes as true what is not denied.

These statements to the court made by the respective parties are called the "pleadings," and they constitute the first step in the process of arriving at a "perfect case." They perform the service of placing before the court all the facts constituting the case, and pointing out which ones are true by admission of the parties, and which are in dispute. To the extent that the facts are admitted, the perfect case is already attained. If they are all admitted, there is no need for further machinery to evolve it. This sometimes happens, and when it does the case

is ready for the application of the law, without further proceedings.

When the criminal stands before the bar, and pleads "Guilty" to the facts charged against him, there is no need for witnesses or jury. A perfect case is made, and it is only left to apply the law. When, however, he pleads "Not guilty," the determination of the facts must be accomplished by other machinery, devised for that purpose, before the law can be applied.

JUDICIAL NOTICE AND ADMISSIONS AS FACTORS IN ARRIVING AT THE FACTS OF A CASE.

9. When it has been determined what facts are actually in issue, the establishment of such facts does not depend entirely upon the use of evidence.

10. The application of the doctrine of judicial notice, and the formal admissions of the parties, may place a part of the facts in issue above necessity of evidence.

Whether all or only a part of the facts are in dispute on the pleadings, the next step is the determination of what the real truth is with respect to such facts as are in dispute. This is accomplished in three distinct ways, two of which may be called negative, and one positive:

(1) By the exercise on the part of the court of its own intelligence, and the taking of certain facts as true, for various reasons deemed sufficient to justify the court in so doing. This requires action on the part of the court, which supplies to itself facts needed to complete the case.

(2) By admission in court, and outside of the pleadings, of facts in dispute on the pleadings.[8] This requires action on the part of the parties, who supply by admission facts needed to complete the case.

[8] Such admission must not be confounded with the confession or admission of a party which may be proved in evidence, and which may be a justification to the jury to find the facts, in accordance with the admission, by reason of a probative force in the admission, or because it excuses proof. The admissions referred to in (2) are the formal admissions made during the progress of the trial, by the parties, and which operate the same as admissions in the pleading, and bind the court to the facts as admitted.

(3) By the introduction of evidence on the part of the plaintiff and defendant—evidence to prove or disprove the facts in dispute—and the submission of such evidence, when in, to the jury, that they may find, upon it, what the facts in dispute in truth are; thus completing and certifying to the court the balance of the facts constituting the case, in order that the law may be applied. This third method requires action on the part of the jury, who, by their determination, supply to the court facts needed to complete the case. This method produces a far from "perfect case," but the usage of centuries sanctions it; and it is perhaps the best method which could be devised, in the absence of agreement between the parties, to arrive at the truth.

The first two methods may be called negative, because they excuse evidence or proof, and result in certain facts being taken as true. The third method is positive, as it is based on the production of evidence or proof. It is true that the law of evidence, strictly speaking, can have nothing to do with the first two methods, and that its peculiar province is the third. Yet as the three are closely united in their relation to the conduct of trials, and the first two affect directly the necessity of producing evidence, they may be advantageously treated in connection with the law of evidence.

The subject of formal admissions by the parties for the purposes of the trial is one about which little need be said. Their effect is the same as though contained in the pleadings. They are often made by the one party or the other to expedite the trial, especially in relation to formal matters about which proof would otherwise be required. The subject of judicial notice is much more important and extensive, and is taken up in the following chapter.

CHAPTER II.

JUDICIAL NOTICE.

11-12. The Doctrine in General.
13. Effects Produced by the Application of the Doctrine.
14-15. Facts Judicially Noted in Relation to Proof.
16. The Doctrine Both Mandatory and Permissive.
17. Facts Required to be Noticed.
18. Reasons for the Rule.
19. By Statute.
20. By Common Law.
21-24. Governmental Matters.
25. Phenomena of Nature.
25½. Facts Related to Lives of Mankind.

THE DOCTRINE IN GENERAL.

11. The subject of judicial notice is not properly a part of the law of evidence; but, as it embraces the rules which relate to the facts in issue which are assumed to be true without evidence, it is closely allied to it.

12. The doctrine of judicial notice is that there are certain facts of which the court will not require evidence, because they are so well known, so easily ascertainable, or so related to the official character of the court, that it would not be good sense to do so.

The subject of judicial notice is deserving of being treated in connection with, if not as a part of, the law of evidence. It has to do with evidence, in a negative sense, in that it teaches when evidence need not be given. It is not always necessary to prove every fact which goes towards the making up of a case. The fact may be of such a nature that the court either cannot or will not require any proof.

In the process of presenting a case to the court for the application by it of some legal principle, we have seen that the pleadings do something.[1] They state to the court the facts claimed by each party to the litigation to be true—lay a foundation for the subsequent proceedings.

[1] Ante, p. 14.

Often they go a step further, and, by the admissions they contain of the material facts in the opposite party's pleading, eliminate certain of the facts from the realm of proof.

When the trial is reached, and the facts left in dispute are brought to the attention of the court, the principle of judicial notice may come in, and relieve the parties still further from the necessity of producing evidence. The principle of judicial notice is largely one of common sense. It is not common sense to compel formal proof of a thing which is a matter of common knowledge, or which is a matter about which the court, as a part of the government, knows or can easily ascertain. Most of the rules of evidence are founded on the principle of life being too short to allow everything which is logically relevant to be admitted, and are rules of exclusion. The principle of judicial notice is founded in part on the same regard for the limitations of time.

EFFECTS PRODUCED BY THE APPLICATION OF THE DOCTRINE.

13. The only direct effect of the application of the doctrine is to relieve the parties from the necessity of introducing evidence to prove the fact noticed; but there are certain indirect effects which need to be considered and distinguished.

As above explained, the natural and obvious effect of the taking by the court of judicial notice of a fact is to relieve the parties from the necessity of introducing evidence.

The fact may be either (a) one of the main facts in the case;[2] or (b) an evidential fact necessary or helpful in establishing a main fact. In either case the party who had the burden of

[2] Ryer v. Prudential Ins. Co., 85 App. Div. 7, 82 N. Y. Supp. 971. One of the main facts in issue was the commencement of the suit within six months after the death of the assured. No proof was offered by the plaintiff on the point. The court, however, judicially noticed that the action, having been started on October 28th, which was Monday, was, under the construction of time applicable, within six months after the death, which was proved to have taken place on April 27th; the plaintiff being allowed an additional day by reason of October 27th, the last day of the period, falling on Sunday.

proving the fact is relieved from such burden. This is the first effect observable.

Now, what, if any, further consequences follow the taking of judicial notice?

In the cases we find frequent inclination to make more of the situation and attribute more to the application of the doctrine than proper regard for its real nature would warrant. Usually some other principle in the law of evidence has been applicable, and has been unconsciously followed by the court, and its effect confused with the effect of the doctrine professedly applied.

In a recent case [3] a material fact in establishing liability on the part of the defendant was knowledge that a certain disease, known as "Texas" or "splenetic" fever, was infectious or contagious. The court held that it was not necessary to prove the fact that the disease was infectious or contagious, that this was a matter of common knowledge, of which the courts should take judicial notice, and invoked this principle as the basis for upholding an instruction by the trial judge that the *defendant was chargeable with notice that the disease was infectious or contagious.*

Now, here are two facts and a clear distinction between them —first, the fact that the disease was *infectious* or *contagious;* second, the fact that the defendant *had knowledge of the character of the disease.* The plaintiff quite properly was required to give evidence of neither. As to the first, because the court would judicially notice it; as to the second, not because the court would judicially notice it—in fact, it is absurd to suppose that the court could take judicial notice that this particular defendant had knowledge of the character of the disease; quite likely it did not have—but because the nature of the fact was such that any reasonably intelligent person should have known it, and therefore the defendant would be treated as though he did know it and be held responsible therefor, a very common application of the so-called "conclusive presumption" which is hereafter treated of.[4]

Here is a case, then, where the application of the doctrine of

[3] Dorr Cattle Co. v. Railway Co., 128 Iowa, 359, 103 N. W. 1003.

[4] Post, pp. 84, 85, 95.

judicial notice seemed inevitably to open the door to the application of the doctrine of conclusive presumption. Query—will it always follow, because the court holds that a fact is a fact to be judicially noticed, that the party affected will be deemed to have knowledge of that fact and be treated accordingly? [5] — No.

Suppose, for example, that a member of the savage tribes exhibited at the St. Louis Exposition, of mature age and ordinary attainments according to the standards of his native country, but having no familiarity with the weapons of modern warfare, should toss a live coal into a keg of gunpowder, killing a number of bystanders, the court would undoubtedly judicially notice the fact that a live coal brought into contact with gunpowder would produce disastrous results, and the further fact that the effect of such contact is known to any ordinarily intelligent human being. But would the court conclusively presume that the defendant knew the facts thus noticed and treat him accordingly? No

FACTS JUDICIALLY NOTICED IN RELATION TO PROOF.

14. Facts which are judicially noticed are generally considered outside of the realm of proof, but,

(a) If the facts are of the class which the court is bound to notice, but the court does not have a present knowledge of them, evidence, or, strictly speaking, information, to assist the court may be permitted.

There is a distinction to be borne in mind in the application of the doctrine of judicial notice, which, if clearly perceived, will save much confusion of thought.

A fact judicially noticed, whether it be evidence of another

[5] In another case, where defendant was sued for damages caused by mules starting up suddenly, it was held that "the mule is a domestic animal whose treacherous and vicious nature is so generally known that even courts may take judicial notice of it. The defendant cannot be heard to claim that he did not know of the treacherous and unreliable qualities of the animal," Borden v. Falk Co., 97 Mo. App. 566, 71 S. W. 478. See, also, John O'Brien Lumber Company v. Wilkinson, 123 Wis. 272, 101 N. W. 1050, where a general trade custom was judicially noticed, and the parties were conclusively presumed to have included it in their contract.

fact which is in issue or be the main fact, is at once taken out of the realm of proof so far as its prima facie establishment is concerned. Anything made use of to make the fact clear and certain, whether furnished by the attorneys or found by the court, and whether oral statement or of documentary character, is not to be treated as evidence or as subject to the rules of evidence. It is merely the material used by the court for its own enlightenment, and may not at all satisfy the requirements of legal proof.[6]

A curious example of the confusion which follows the failure to note the above distinction is found in a case where the judge wished to proceed upon the assumption that the name "Bob" was an abbreviation for Robert and "Jack" for John, and, conceiving that evidence was necessarily bound up with the doctrine, himself took the stand, and, having been sworn, testified to the said facts.[7]

The opinion seems generally to have prevailed that the courts, at all times, have the discretion to refuse to take judicial notice and require proof of facts. If this is so, what, then, is the meaning of the rule that the courts must take judicial notice of certain facts? and where is the distinction between what the courts must, and what they may, judicially notice? The fact is the statement is not accurate, nor is it borne out by decisions. It is quite true that the court may be in actual ignorance of a fact of which it is required to take notice. What, then, is it to do? Can it not require proof? It cannot; but it may inform itself, or may require counsel in their capacity as officers of the court, to assist it in obtaining the requisite information, from the proper sources. This is in no sense proof, and should not be treated as such.[8]

[6] State v. Main, 69 Conn. 123, 37 Atl. 80, 36 L. R. A. 623, 61 Am. St. Rep. 30. In this case the court says: "If, in regard to any subject of judicial notice, the court should permit documents to be referred to or testimony introduced, it would not be, in any proper sense, the admission of evidence, but simply a resort to a convenient means of refreshing the memory, or making the trior aware of that of which everybody ought to be aware."

[7] Alsup v. State, 36 Tex. Cr. R. 535, 38 S. W. 174.

[8] In the case of School Dist. No. 56 v. Insurance Co., 101 U. S. 472, 25 L. Ed. 868, the court required, under a rule of court provid-

15. (b) If the facts are of the class which the court may in its discretion judicially notice, the party affected adversely by the facts noticed should be permitted to introduce evidence to disprove them.[9]

A recent case [10] has been cited as a case where the court refused to receive evidence to disprove a fact of which it took judicial notice. The fact judicially noticed was that prolonged labor in a smelter is as a general thing injurious to health, and an act limiting the hours of labor was held constitutional. The evidence offered was that defendant's occupation in such smelter was not injurious. The evidence was rightly excluded, not because it was in disproof of the fact judicially noticed, so much as for the reason that it was immaterial. The fact that the occupation was not injurious to a particular individual was not in disproof of the general proposition of the injurious char-

ing that attorneys must print in their briefs state statutes material to a decision, the help of the parties as to a matter of which it was bound to take judicial notice; but it seems to have been rather in a nature of service which it had the right to demand of the attorneys, as officers under its control, than in the nature of proof.

In Bosworth v. Union Ry. Co., 26 R. I. 309, 58 Atl. 982, counsel called to the attention of the court certain facts, and the court says: "The plaintiff's counsel calls to our notice the historical event connected with this strike, and particularly that very early in the morning of the day when this injury was inflicted the Governor had ordered a military force to Pawtucket to preserve order and restrain violence towards the property and employés of the street railroad company, and had issued his proclamation calling upon persons riotously assembled at Pawtucket to disperse. These circumstances are such as the court takes judicial notice of when brought to its attention."

[9] In La Rue v. Kansas Mutual Life Ins. Co., 68 Kan. 539, 75 Pac. 494, the court perhaps confused historical facts, which, in its discretion, it might have noticed, with other facts of governmental concern, which it was bound to notice, and then rejected evidence offered to disprove the historical fact, on the ground that the court could not listen to evidence in disproof of a fact judicially noticed. Proper distinction between the two classes of facts in the case would probably have resulted in the court admitting the evidence which related only to the historical facts, and then, in the light of its own knowledge, together with the evidence introduced, have decided the matter.

[10] Ex parte Kair, 28 Nev. 127, 80 P. 463.

acter of prolonged labor in such places to workmen as a class, and it was this proposition which the court judicially noticed. It is quite likely that, had competent and material evidence been offered to show that the court was wrong in accepting this proposition as a fact, the court would have received it.

The principle is well settled that facts of which the court will take judicial notice need not be pleaded. The effect of the doctrine is, therefore, not only to dispense with proof, but to relieve the parties from the necessity of setting forth in their pleadings many essential parts of their case.[11]

It is said that allegations in a pleading which are inconsistent with facts judicially noticed will not be admitted by a demurrer,[12] thus making it appear that the doctrine of judicial notice has a peculiar effect upon the ordinary function of a demurrer. A better explanation of the status produced by the concurrent application of the doctrine of judicial notice and the theory of demurrer is that what really takes place is that the court treats as set forth in the pleading the facts which it judicially notices, and that the demurrer, when interposed, admits the facts in this form.[13]

The court, perhaps, went to the extreme in giving effect to the doctrine when it declared erroneous findings of fact inconsistent with facts judicially noticed, though it softened the ap-

[11] Altoona Q. M. Co. v. Integral Q. M. Co., 114 Cal. 100, 103, 45 Pac. 1047; Vance v. Rankin, 194 Ill. 625, 62 N. E. 807, 88 Am. St. Rep. 173; North Platte Waterworks Co. v. City of North Platte, 50 Neb. 853, 70 N. W. 393; Burlington Mfg. Co. v. City Hall Com'rs, 67 Minn. 327, 69 N. W. 1091.

[12] French v. State Senate, 146 Cal. 604, 80 Pac. 1031, 69 L. R. A. 556. A., in an action for reinstatement, alleges that he was expelled from the Senate of the state without a hearing, was not permitted a trial upon the charges made, nor permitted to make any defense, that the charge was bribery, and that it was false. The defendant, the Senate, demurs generally.

The court will not treat the facts as admitted by the demurrer, but will judicially notice the private acts of the Senate in the proceedings resulting in A.'s expulsion, which show full investigation and a finding that the charge was true, and will treat the statements in the complaint as a nullity. See, also, statements in 12 Ency. of Pl. & Pr. 1.

[13] Mullan v. State, 114 Cal. 578, 581, 46 Pac. 670, 34 L. R. A. 262.

pearance of its action by declaring the findings to be a statement of a conclusion.[14]

THE DOCTRINE BOTH MANDATORY AND PERMISSIVE.

16. The law of judicial notice, as it exists to-day, is both mandatory and permissive. Of certain facts the court is bound to take judicial notice. Of certain other facts it may, in its discretion, do so.

What principle, if any, divides that of which the court must take judicial notice from that of which it may take such notice? It is doubtful if there is any well-defined principle of distinction, by which a matter can be placed on the one side or on the other of a dividing line.

Facts of a nature to require assumption by the court in the event of their becoming material are usually so axiomatic as to be a part of the common knowledge in accord with which all men order their lives.

That the live coal will burn the skin, that water will flow down hill, that two and two make four, are the kinds of facts which the court must assume, or, in other words, take judicial notice of. If this were not done, and the court for lack of proof should decide against the party to whose case such facts were material, it would clearly be error for which a new trial would be granted.

Cases of this sort do not occur in the books, because judges are ordinarily sensible beings, and think and act in the ordinary way.

When we go outside of things axiomatic in character there are other classes of facts which the court must assume without proof; facts, for example, of such universal and common knowledge that to require proof of them would be an absurdity. It would be a waste of time to permit evidence that the Atlantic Ocean was east of the United States, that California was west of New York, that horses customarily eat oats, that cows give milk, that Washington was the first President.

[14] Edson v. Southern Pacific R. Co., 144 Cal. 182, 77 Pac. 894, 898. The fact judicially noticed here was that comparatively few persons claim the privileges which go with unlimited railway tickets.

Again, we find a third class of facts of which the court is assumed to be cognizant, and of which, therefore, it must take judicial notice. Facts within this class are facts of governmental concern, having to do with the machinery of which the court is a part. Actual knowledge may not exist on the part of the court in respect to facts of this class. The sources of information are, however, peculiarly accessible to the court, and the information easily obtainable.

Outside of the three groups of facts above mentioned there may be facts of which the court will be required to take judicial notice because the statutory or common law compels it.

The facts required by the statutes to be noticed without proof may or may not fall within the classes above referred to. When it becomes a question of statutory provision, then the statute itself is the ultimate source of the authority, and its provisions must be complied with.

As to matters which by common law have been fixed as subjects of which courts are bound to take notice, it is doubtful if there is any general doctrine which can be laid down. In certain jurisdictions decisions have fixed the law, and subsequent cases involving similar questions would doubtless be held subject to the precedents made by previous authoritative decisions; but no general rules could be stated which would apply in all jurisdictions.

In fact, a discussion of this phase of judicial notice would encroach so largely upon the field of discretionary matters as to confuse, rather than to clarify, the subject.

As to discretionary matters there is often difficulty in determining in any given case whether the court will take judicial notice.

There are things which are so near the dividing line that it is difficult to say upon which side they belong. In fact, the law may be in a formative state. That of which the court will not take judicial notice to-day may be recognized to-morrow as out of the realm of proof. That which will be matter of common knowledge in one country or locality, and be judicially noticed, in another will be entirely beyond the knowledge or experience of the court or the people.[15]

[15] State v. Main, 69 Conn. 123, 37 Atl. 80, 36 L. R. A. 623, 61 Am. St. Rep. 30. The court took judicial notice of the prevalence of the

In the exercise of the function of judicial notice, the courts simply reflect the state of the times, and progress with the progress of the people.[16]

FACTS REQUIRED TO BE NOTICED.

17. From the above general explanation we may formulate a classification of facts required to be noticed as follows:

(a) The courts must notice facts which they are required by statute to notice whatever the character of such facts.

(b) The courts must notice facts which by the common law (i. e., the decisions of courts), have become fixed as proper subjects for judicial notice. Such facts may be classed as (1) facts axiomatic in character, (2) so universally accepted as to be part of the common knowledge of mankind, and (3) which relate to the court itself or the governmental machinery of which it is a part.

disease among peach trees known as "peach yellows," and of its serious character, resulting in the premature death of the trees affected. This illustrates the recognition of local conditions in nature.

The Elihu Thompson (D. C.) 139 Fed. 89, where the court took judicial notice of the "intimate commercial relations existing between the ports of Puget Sound and Alaskan ports," and made this fact the basis of an inference that the highest rate of wages paid to seamen at Nome was not less than the usual rate paid at Tacoma.

Denegre v. Walker, 114 Ill. App. 234, where the Appellate Court took judicial notice of the fact that many buildings in the business center of Chicago are erected under long-term leases. For an extreme case of local application of doctrine, see Hauns v. Central Ky. Lunatic Asylum, 103 Ky. 562, 45 S. W. 890.

[16] A very apt illustration of this is found in the following case: United States v. Strauss Bros. & Co. (1905) 136 Fed. 185, 69 C. C. A. 201. Upon a question of whether the classification of ping-pong balls as toys was proper, the United States Circuit Court of Appeals held that, though no evidence had been introduced as to the nature of the game of ping-pong, "we cannot close our eyes to the fact that the game of ping-pong is ordinarily played on a table which is of such a height that it would be difficult for children to play the game; that it is the game indulged in by adults, and one which requires a degree of skill not ordinarily possessed by children; and that ping-pong balls are sold in stores where athletic goods, such as footballs, baseballs, tennis balls, and golf balls are sold."

With respect to this class of facts the statement of the rule is virtually saying that what is required to be judicially noticed must be judicially noticed, and merely explains the two sources of the authority by which it is required. It will be seen that, while the determination whether any particular matter comes within the terms of a statute may be comparatively easy, the question of whether it is required to be judicially noticed by any rule of the common law may present much difficulty. Once determined, however, to come within either rule, it is taken out of the realm of discretion.

Before passing to an examination of the more prominent instances in which statutes or the common law require judicial notice to be taken, it will be well to inquire whether there are not some reasons upon which the statutes or the rules of the common law are based.

SAME—REASON OF RULE.

18. Two principles seem, in a loose way, to be at the bottom of the statutes and decisions:

(a) The court, as a part of the government, should notice, without proof, facts of governmental concern.

(b) The court, as composed of intelligent beings, should exercise that intelligence in the ordinary way, and take as true, without proof, what is matter of universal knowledge—knowledge in accordance with which all men conduct their daily affairs and regulate their lives.

"The administration of justice is carried on by the sovereign. The sovereign, in the lapse of time, has lost something of his concreteness, if he has not become a mere political expression. But, when the king long ago sat personally in court, and in later times, when judicial officers were, in a true and lively sense, the representatives, and even were deputies, of the king, it was an obvious and easily intelligible thing that courts should notice without evidence whatever the king himself knew or did in the exercise of any of his official functions, whether directly, or through other high officers.[17]

[17] Thayer, 3 Harv. Law Rev. p. 303.

It is equally intelligible and sensible that the courts to-day—a co-ordinate branch of the government—should notice, without proof, governmental acts and relations, and other matters of governmental concern, satisfactory proof of which, if not already known, is within easy reach of the courts, but which would be difficult for litigants to prove in accordance with the rules of evidence. These are the sort of matters to which the statutes requiring judicial notice to be taken mainly relate.[18]

As to the second principle, that involving the element of universal knowledge, it is so clearly founded on common sense and true public policy that it immediately commends itself to the mind.

It is a broad principle, and has not always been satisfactorily applied in the decisions which have defined the matters of which the courts must take judicial notice; but, if not applied as consistently or as generally as it should have been, it is none the less the principle upon which the decisions rest.

SAME—BY STATUTE.

19. The facts required to be judicially noticed by statute are mainly of one kind, viz.: Facts which are matters of record, such as the statutes themselves, or matters of a formal nature, having to do with the requirements of the statutes, as the acts of public officers or persons in semipublic positions; such facts as are unlikely to be disputed, and yet which are difficult of regular proof.

In some of the states all acts of the Legislature, public or private, are required by statute to be judicially noticed.[19]

[18] In a little book by McKinnon, published in 1812, called "Philosophy of Evidence," which is one of the few in which the subject of judicial notice is intelligently treated, it is said (page 32): "Courts of justice, as the organ of government, particularly those sitting in Westminster Hall, 'where the king himself originally presided,' are cognizant of a variety of facts, for which no evidence is required in indenture cases." And again (page 37): "Courts of law, therefore, as constituting part of the government of the country, are cognizant of its acts privy to the foregoing matters of evidence, as falling under their own immediate observation."

[19] See Mullan v. State, 114 Cal. 578, 46 Pac. 670, 34 L. R. A. 262,

Statutes have long existed in the United States and in England providing that certain facts as to acts of the different departments of the government and various officials thereof should be taken as true without proof. It is a common thing that official acts and proceedings may be considered proved upon the production of reports of them contained in certain specified newspapers.

In England the different acts passed from time to time, and known as "Documentary Evidence Acts," eliminate much from the realm of positive proof. Proclamations, orders, and regulations of the different departments of government, proceedings in the houses of Parliament, and proclamations, treaties, and acts of state of foreign countries, are all required to be taken as true upon the production of certain sorts of reports and copies. Such reports and copies are at least semiofficial, and therefore have some guaranty of correctness. These reports and copies are in no sense proof, but rather are to bring to the mind of the court that of which it is assumed to have knowledge.[20]

It is often provided that "no proof shall be required of the handwriting or official position of any person certifying, in pursuance of the act, to the truth of any copy or extract from any proclamations or regulations.[21]

The statutes passed from time to time, both in the various states and in England, have brought within the scope of judicial notice the seals and signatures of many public officers, departments of government, courts, judges, and public and private corporations.[22]

for reference to the California statute which requires notice to be taken of all public or private acts of the legislative, executive, and judicial departments of state. The Constitutions or general laws of certain states provide that every statute shall be deemed public, unless otherwise declared in the statute itself. This is so in Indiana, Rhode Island, and Oregon. In such cases the courts are bound to take judicial notice of all statutes. Foley v. Ray, 27 R. I. 127, 61 Atl. 50.

[20] Taylor, Ev. § 1523.

[21] Documentary Evidence Act 1868, § 2, as amended in 1892. By St. 13 & 14 Vict. c. 21, § 7, it was provided that every act of Parliament after that date (1851) should be declared a public act, and should be judicially noticed.

[22] Only a few of the statutes of this nature need be referred to

An example of the extension of the principle by a rule adopted by the court is found in England. It is provided that in the proof of examinations, affidavits, declarations, affirmations, etc., taken in foreign parts, in suits before judges, courts, notaries public, or persons lawfully authorized to administer oaths, "the judges and other officers of the high court shall take judicial notice of the seal or signature, as the case may be, of any such court, judge, notary public, or person lawfully authorized to administer oaths.[23]

SAME—BY COMMON LAW.

20. The facts which, by reason of the common law or the established practice of courts, will be noticed without proof, are much more varied in character than those required by statute to be noticed. They may, in a loose way, be classified as follows:

(a) Matters relating to the government of which the court is a part, or matters of governmental concern;

(b) Matters relating to the phenomena of nature, and to the physical sciences;

(c) Matters relating to the customs, habits, actions, and lives of mankind. The court may or may not notice facts of this character; it remaining in the discretion of the court.

MATTERS RELATING TO THE GOVERNMENT.

21. Courts are, by the common law, primarily bound to notice the nature and constitution of the government of which they form a part, the system under which they are established, and their own powers and jurisdiction. These are matters upon which the assumption to act in a judicial capacity is based, and are not subject to dispute.[24]

as example of the class: Documentary Evidence Act 1845 (St. 8 & 9 Vict. c. 113); Rev. St. U. S. § 905 [U. S. Comp. St. 1901, p. 677]; Pub. St. Mass. c. 169, § 67; Code Civ. Proc. N. Y. § 921 et seq.

[23] Order 28 of the rules of the Supreme Court (1883); Taylor, Ev. § 12.

[24] As to the holding of Parliament: Rex. v. Wilde, 1 Lev. 296; Birt v. Rothwell, 1 Ld. Raym. 210, 343. As to the extent of a judicial district: Boggs v. Clark, 37 Cal. 236. As to congressional dis-

As to matters relating to the government, much is of a character similar to that which has become the subject of statutory provisions. The same reasons which have led to the enactment of statutes requiring judicial notice to be taken have influenced courts in determining that certain matters not covered by statutory provision should be noticed.

As to matters of governmental concern, it has already been mentioned [25] that the origin of the rule lay in the identity of the judiciary with the sovereign. The system long ago developed beyond and away from this idea, and, while it was the origin, it is no longer the reason for the application, of the principle of judicial notice in matters of this sort. Nor does the reason lie in any theory of notoriety, strictly speaking. In fact, in most cases the very opposite of notoriety exists. The facts judicially noticed are quite likely to be facts which, while easily ascertainable from public documents and reports, are generally unknown. Perhaps it would be as near the truth as anything to say that the courts notice without proof these matters, on the general ground of public policy. It would scarcely befit the dignity of the judicial tribunal to permit dispute, and require ordinary proof, as to the nature, position, and acts of the government of which it is a vital part; and it would be equally unjust to litigants, who in many instances would be utterly unable to prove the facts by the sort of evidence required in the proof of ordinary facts. These reasons, combined with the small chance of mistake in relying upon the source of information open to the court, probably explain the position of the court in respect to this phase of the subject of judicial notice.

It goes without saying that the court must notice the provisions of the Constitution of the state, as well as any amendments.[26]

tricts: U. S. v. Johnson, 2 Sawy. 482, Fed. Cas. No. 15,488; State v. Ray, 97 N. C. 510, 1 S. E. 876. As to the political party called "Republican": State v. Downs, 148 Ind. 324, 47 N. E. 670. As to an international custom: The Paquete Habana, 175 U. S. 677, 20 Sup. Ct. 290, 44 L. Ed. 320.

[25] Ante, p. 28.

[26] Carmody v. St. Louis Transit Co., 188 Mo. 572, 87 S. W. 913. Who are the state officials will be noticed. Bailey v. McAlpin, 122 Ga. 616, 50 S. E. 388.

The geographical boundaries and the political divisions of the country also come under this head. The division of a state into counties and towns are judicially noticed.[27]

In an action for trespass on land in Ware county, A., to prove ownership, offers a deed describing a certain lot situated in Appling county. The court should judicially notice the fact that a portion of Appling county was created into a new county, called Ware, and that the land described in the deed is included within that portion.[28]

22. Other matters of governmental concern, which the courts are bound to notice without proof, are the acts of the legislative branch of the government; i. e., the statutes.

Very often the authority for judicially noticing the statutes is found, as has been heretofore noticed, in the statutes themselves. Sometimes, however, the statutes are silent on the subject. Nevertheless the common-law rule is equally binding

[27] State v. Simpson, 91 Me. 83, 39 Atl. 287; Board of Commissioners of Jackson County v. State, 147 Ind. 476, 46 N. E. 908; Bartholomew v. First Nat. Bank, 18 Wash. 683, 52 Pac. 239; Richardson v. Hedges, 150 Ind. 53, 49 N. E. 822; Winnipiseogee Lake Co. v. Young, 40 N. H. 420; Commonwealth v. Desmond, 103 Mass. 445; Smitha v. Flournoy's Adm'r, 47 Ala. 345; Money v. Turnipseed, 50 Ala. 499; People, to Use of Town of Highland, v. Suppiger, 103 Ill. 434; Town of La Grange v. Chapman, 11 Mich. 499; Stoddard v. Sloan, 65 Iowa, 680, 22 N. W. 924; Boston v. State, 5 Tex. App. 383, 32 Am. Rep. 575; Gilbert v. Manufacturing Co., 19 Iowa, 319; U. S. v. Jackson, 104 U. S. 41, 26 L. Ed. 651; Thorson v. Peterson (D. C.) 9 Fed. 517; Sever v. Lyons, 170 Ill. 395, 48 N. E. 926; Bishop v. Insurance Co., 85 Mo. App. 302. But the court will not judicially notice the population of a county, except as it may be a matter of public record. Adams v. Elwood, 176 N. Y. 106, 68 N. E. 126. In Missouri it has been held township lines will not be noticed. Mayes v. Railroad Co., 71 Mo. App. 140.

Certain facts of a geographical nature, of purely local importance, the court will not notice; for example, it will decline to judicially notice exactly where a two-mile limit from the city of Seattle would lie. Town of West Seattle v. Improvement Co., 38 Wash. 359, 80 Pac. 549; Slattery v. Harley, 58 Neb. 575, 79 N. W. 151.

[28] Stanford v. Bailey, 122 Ga. 404, 50 S. E. 161.

on the court, and requires that legislative acts of a public nature be noticed.

The statutory law is a part of the system of law which the courts administer, and is spoken of as distinguished from the common law, which is the other part of the system. Right here a confusion has arisen. It is generally said that the courts will judicially notice both the common and statute law.[29]

What is really meant is that they will notice the fact of the existence of the statutes and the existence of their own decisions.[30]

It may take a process of reasoning, or several of them, to determine what either the statute law or the common law is with reference to any particular subject; for statutes must be interpreted, and decisions frequently conflict. Where legal reasoning begins, there judicial notice ends, and the courts exercise another, but not less important, function.

The statutes which the courts under the common-law rule notice without proof are confined to those statutes of their own country or state which may fairly be called public statutes.[31]

[29] Tayl. Ev. § 5; Steph. Dig. Ev. (Chase's Ed.) p. 117, and note; Best, Ev. (Chamberlayne's Ed.) p. 253.

[30] Allen v. Swoope, 64 Ark. 576, 44 S. W. 78.

[31] Whether a statute be a public act is sometimes a question of difficulty. Its character as such is usually determined by the extent to which it affects the people in general. If it defines or regulates the right of an entire community, or all the inhabitants of a particular county or locality, though it does not relate to the whole people, it is deemed a public statute. Rains v. City of Oshkosh, 14 Wis. 403; Burnham v. Webster, 5 Mass. 266; Pierce v. Kimball, 9 Greenl. (Me.) 54, 23 Am. Dec. 537. It is on this principle that acts incorporating municipal corporations are judicially noticed. City Council of Montgomery v. Wright, 72 Ala. 411, 47 Am. Rep. 422; Payne v. Treadwell, 16 Cal. 221; State v. Mayor, etc., of Murfreesboro, 11 Humph. (Tenn.) 217; Beasley v. Town of Beckley, 28 W. Va. 81; Town of Albion v. Hetrick, 90 Ind. 545, 46 Am. Rep. 230; People v. Potter, 35 Cal. 110; Village of Winooski v. Gokey, 49 Vt. 282; Stier v. City of Oskaloosa, 41 Iowa, 353; Prell v. McDonald, 7 Kan. 426, 12 Am. Rep. 423; State ex rel. Oddie v. Sherman, 42 Mo. 210; Gallagher v. State, 10 Tex. App. 469; Alexander v. City of Milwaukee, 16 Wis. 247; Wampler v. State, 148 Ind. 557, 47 N. E. 1068, 38 L. R. A. 829; Town of Central Covington v. Welghans, 44 S. W. 985, 19 Ky. Law Rep. 1979.

Special acts of Congress will not be noticed by state courts.[32]

Where the validity of a statute depends upon ratification by a majority of electors, the court will inform itself of the number of votes cast and the result of the vote from the office of the Secretary of State or any safe means.[33]

Private acts are not noticed, unless special statutory provisions require them to be;[34] but, where the statutes themselves are declared by the Legislature to be public acts at the time of their enactment, they will be judicially noticed.[35]

The principle does not extend to municipal ordinances.[36] Courts will not judicially notice who the officers of a municipal corporation are, or when they change,[37] unless the matter arises in a municipal court, which will notice the acts of the administrative and executive branches of the municipal government, upon the same principle that the state courts notice the acts of the corresponding branches of the state government.[38]

An appellate court will notice judicially whatever the court of original jurisdiction is bound to notice.[39]

[32] Denver & R. G. R. Co. v. United States, 9 N. M. 389, 54 Pac. 336.

[33] State ex rel. Marr v. Stearns, 72 Minn. 200, 75 N. W. 210.

[34] Rudd v. Bank of Owensboro, 105 Ky. 443, 49 S. W. 971.

[35] Hammett v. Railroad Co., 20 Ark. 204; Doyle v. Village of Bradford, 90 Ill. 416; Eel River Draining Ass'n v. Topp, 16 Ind. 242; Covington Drawbridge Co. v. Shepherd, 20 How. (U. S.) 227, 15 L. Ed. 896; Beaty v. Knowler, 4 Pet. (U. S.) 152, 7 L. Ed. 813; Singer Mfg. Co. v. Bennett, 28 W. Va. 16; Collier v. Baptist Education Soc., 8 B. Mon. (Ky.) 68.

The charter of a railway company has generally been held a private act. Jersey City v. Railway Co., 70 N. J. Law, 360, 57 Atl. 445. But see International & G. N. R. Co. v. Hall, 35 Tex. Civ. App. 545, 81 S. W. 82.

[36] City of New York v. Trust Co., 104 App. Div. 223, 93 N. Y. Supp. 937; Gibbs v. City of Manchester, 73 N. H. 265, 61 Atl. 128; Chittenden v. Columbus, 26 Ohio Cir. Ct. R. 531; McIntosh v. City of Pueblo, 9 Colo. App. 460, 48 Pac. 969; Stittgen v. Rundle, 99 Wis. 78, 74 N. W. 586; O'Hare v. Lieb, 66 Ill. App. 549; Baumann v. Granite Co., 66 Minn. 227, 68 N. W. 1074.

[37] State v. Brown, 72 Mo. App. 651.

[38] City of Portland v. Yick, 44 Or. 439, 75 Pac. 706, 102 Am. St. Rep. 633.

[39] Tischner v. Rutledge, 35 Wash. 285, 77 Pac. 388; City of Portland v. Yick, 44 Or. 439, 75 Pac. 706, 102 Am. St. Rep. 633. In the

In the United States the United States courts take judicial notice both of United States and all state statutes.[40]

A., in an action in the United States court against X., offers in evidence a "duly certified notarial copy" of a bill of sale of certain slaves, without accounting for the nonproduction of the original. The bill of sale was executed in Louisiana, and according to the laws of Louisiana the original is recorded and kept by the notary. X. objects on the ground that the original should be produced, or its nonproduction explained. The court will take judicial notice of the laws of Louisiana, and understand, without proof, the nonproduction of the original.[41]

United States courts will not, however, notice the laws of the Indian tribes.[42]

There has been some inclination on the part of the United States courts to bring the English statutory and common law within the field of judicial notice, or at least to be satisfied with the same sources of information (under the name of proof) which would be resorted to in the case of matter of similar character to which the doctrine is applicable.

For example, A. makes a contract with X., in Prince Edward Island, to take charge of X.'s ship Pawashick as captain. A. subsequently libels the ship for his wages. The laws of Eng-

latter case, on an appeal from a municipal court, it was held that, as such court was bound to take judicial notice of municipal ordinances, the appellate court would also take notice.

[40] Elmendorf v. Taylor, 10 Wheat. (U. S.) 152, 6 L. Ed. 289; The Scotia, 14 Wall. (U. S.) 171, 20 L. Ed. 822. The Circuit Courts, as well as the Supreme, are bound to take notice of the statutes of all the states, without regard to where they are sitting. Merrill v. Dawson, Hempst. 563, Fed. Cas. No. 9,469; Jones v. Hays, 4 McLean, 521, Fed. Cas. No. 7,467; Carpenter v. Dexter, 8 Wall. (U. S.) 515, 19 L. Ed. 426; Fourth Nat. Bank v. Francklyn, 120 U. S. 747, 7 Sup. Ct. 757, 30 L. Ed. 825; U. S. v. Turner, 11 How. (U. S.) 663, 13 L. Ed. 857; Miller v. McQuerry, 5 McLean, 469, Fed. Cas. No. 9,583.

[41] Owings v. Hull (1835) 9 Pet. (U. S.) 607, 9 L. Ed. 246.

[42] Wilson v. Owens, 86 Fed. 571, 30 C. C. A. 257. The court here says: "This court does not have convenient access to books, local decisions, or official documents which would enable it to determine with certainty what are the laws of these tribes on various subjects, and we apprehend that the United States courts sitting in the Indian Territory are confronted in a measure at least with the same difficulty."

land as to the rights of the captain against the ship become material, and the question is as to how they shall be proved. Judge Lowell cites with approval the rule laid down by Lord Stowell in Dalrymple v. Dalrymple,[43] that there were three sources of proof: (1) Opinions of learned professors; (2) opinions of eminent writers, as delivered in books of great legal credit weight; and (3) the certified adjudications of the tribunals of Scotland—and says: "I believe the rule thus announced is the true rule for this court in respect to English law. [The case deals with English law alone.] * * * In respect to the laws of France, Germany, or Russia, or any other country which has a wholly different system from our own, I should be inclined to say that the rigid rule might be better." [44]

The state courts notice statutes and public acts of their own state and of the general government, but not of other states.[45]

The following case well illustrates this rule: A. brings action against X., a railway company, for the death of C. The accident happened in a state other than that in which the action is brought, and in which state a special statutory provision

[43] 2 Hagg. Consist. 54, 81.

[44] The Pawashick (1872) 2 Lowell, 142, Fed. Cas. No. 10,851. According to this case the contrary rule is based on Baron de Bode's Case, 8 Q. B. 208, 246; Sussex Peerage Case, 11 Clark & F. 85, 114. What these cases actually decided was that a scientific witness may testify to the written foreign law, with or without the text of the law before him; the value of the evidence resting in the soundness of his opinion, and the court not being supposed competent to criticise it by any comparison with the books.

[45] Kessel v. Albetis, 56 Barb. (N. Y.) 362; Morris v. Davidson, 49 Ga. 361; Chesapeake & O. Canal Co. v. Railroad Co., 4 Gill & J. (Md.) 1, 63; Mims v. Swartz, 37 Tex. 13; Bird v. Com., 21 Grat. (Va.) 800; McCarver v. Herzberg, 120 Ala. 523, 25 South. 3; Teutonia Loan & Building Co. v. Turrell, 19 Ind. App. 469, 49 N. E. 852, 65 Am. St. Rep. 419. Where a state law has been incorporated by implication in an act of Congress, the court of another state will then judicially notice it. Flanigen v. Insurance Co., 7 Pa. 306. And it is generally held that where a case is appealable to the United States Supreme Court, as affecting a right under the federal Constitution, then the state court will take the same notice of the statutes of another state as the United States Supreme Court. Shotwell v. Harrison, 22 Mich. 410; Saltar v. Applegate, 23 N. J. Law, 115; Paine v. Insurance Co., 11 R. I. 411; State of Ohio v. Hinchman, 27 Pa. 479; Jarvis v. Robinson, 21 Wis. 523, 94 Am. Dec. 560; Butch-

makes X. liable without proof that there was negligence. A. does not allege negligence, but relies upon the special statutory provision, failing, however, to allege it in his complaint. On demurrer A. cannot recover, as the court will not judicially notice the statute of the other state.[46]

But state courts will notice the statutes of a sister state, when necessary in order to give full force and effect to the judgment of such sister state.[47]

The rule that state courts will notice acts of the various departments of the general government has been carried to the extent of including post office regulations.[48]

As to their own and the decisions of other courts in the same jurisdiction, the courts require no proof. They notice them as the expression of, or the basis from which they may by legal reasoning arrive at, the principles of the common law. These decisions are the formal acts of the judicial department of the government, just as the statutes are the acts of the legislative department.[49]

23. As to the practice, the rules, the proceedings, and doings of other courts not embodied in the decisions emanating from such courts, no uniform doctrine with respect to judicial notice has been evolved.

As examples of how this subject has been treated, it has been said that "an appellate court will notice the terms of the circuit courts" of the same state and the length of each term.[50]

er v. Bank of Brownsville, 2 Kan. 70, 83 Am. Dec. 446. It is interesting to compare this with the illustrations cited in the text, where the Supreme Court, upon appeal, treated as a matter of fact admitted by demurrer the allegation as to the law of a sister state, though, if it had come before it in the first instance, it would have been the subject of judicial notice.

[46] Myers v. Railway Co., 69 Minn. 476, 72 N. W. 699, 65 Am. St. Rep. 579.

[47] Hull v. Webb, 78 Ill. App. 617.

[48] Carr v. First Nat. Bank, 35 Ind. App. 216, 73 N. E. 947, 111 Am. St. Rep. 159.

[49] Swain v. Comstock, 18 Wis. 463, 466; Wilson v. Bumstead, 12 Neb. 1, 10 N. W. 411; Hinde v. Vattier, 5 Pet. (U. S.) 398, 8 L. Ed. 168; Pennington v. Gibson, 16 How. (U. S.) 65, 81, 14 L. Ed. 847.

[50] Indiana Mut. Building & Loan Ass'n v. Paxton, 18 Ind. App. 304, 47 N. E. 1082; Scruton v. Hall, 6 Kan. App. 714, 50 Pac. 964.

An appeal undisposed of will be noticed by a court of the same jurisdiction.[51]

That a question involved in a suit has been before the courts at a previous time for adjudication will be noticed.[52]

Courts will not ordinarily take notice of their own records, outside of the particular case before them.[53]

This subject belongs, perhaps, more properly under the head of matters which may in the discretion of the courts be judicially noticed.[54]

The subject of how far the statutory and common law is in itself the subject of judicial notice is one which has not always been treated with lucidity in the cases. In fact, there has been a tendency to regard both statutes and common-law rules as legitimate material for the application of the doctrine, without distinction as to whether they have been called in question in such form that they could be said to be properly a part of the case, or have simply been involved as governing principles to fix the rights and liabilities of the parties upon the case as presented. There is, it is submitted, a very clear distinction between the two forms in which statutes, and even principles of common law, may become material in a case.

In the one form the court may properly be said to take judicial notice of facts which are a material part of the case, while in the other it does not in any sense exercise this function, but quite another, to wit, the duty of interpreting and applying the law to the fact—the law which is the source and reason for its existence and activity.

The distinction may be illustrated by a case such as the following: The sufficiency of a chattel mortgage was called in question on the ground of misdescription; the property being described as situated in township 20, Butler county, and it being alleged that said township was not in said county. The court judicially noticed the fact that such township was not in

[51] McClain v. Williams, 11 S. D. 60, 75 N. W. 391.

[52] Story v. Ulman, 88 Md. 244, 41 Atl. 120. But see Anderson v. Cecil, 86 Md. 490, 38 Atl. 1074.

[53] Gibson v. Buckner, 65 Ark. 84, 44 S. W. 1084; Anderson v. Cecil, 86 Md. 490, 38 Atl. 1074; In re Osborne, 115 Fed. 1, 52 C. C. A. 595.

[54] In re Osborne, 115 Fed. 1, 52 C. C. A. 595.

the county stated, because the boundary of the county was fixed by statute.

It then proceeded to apply the rule of common law, "established by a long line of adjudicated causes," that "it is essential to the validity of a chattel mortgage that there be certainty in the description of the property conveyed by it, but 'id certum est quod certum reddi potest,'" properly treating this as the mere application of the law, and not as judicial notice.[55]

On the other hand, an illustration of a confusion of ideas on the subject is found in Edelstein v. Schuler,[56] where the action was by A. against X. for value of certain bonds alleged to have been converted.

It was shown that the bonds were made payable to bearer, and that X. was a bona fide purchaser for value. The court states the law as follows: "Thus it had been found convenient to treat securities like those in question in this action as negotiable, and the courts of law, recognizing the wisdom of the usage, have incorporated it in what is called the 'law merchant,' and have made it a part of the common law of the country." Then, further commenting: "I think that it is no longer necessary to tender evidence in support of the fact that such bonds are negotiable and that the courts of law ought to take judicial notice of it." [57]

24. Next come the official acts of the executive department, which are equally the subjects of judicial notice. These include treaties, proclamations, executive decrees, and the recognition of foreign powers, and such facts connected therewith as their national seals and flags.

Whether courts will notice all acts of state departments and officers seems questionable, though in a late Mississippi case [58]

[55] City National Bank v. Commission Co., 93 Mo. App. 123. See Matter of Hall, 61 App. Div. 266, 70 N. Y. Supp. 406, for a treatment of the common-law principle in both forms.

[56] 71 L. J. K. B. 572.

[57] See, also, Hilton v. Roylance, 25 Utah, 129, 69 Pac. 660, 58 L. R. A. 723, 95 Am. St. Rep. 821.

[58] Gulf & S. I. R. Co. v. Adams, 85 Miss. 772, 38 South. 348.

the court judicially noticed that a railroad was assessed during certain years upon an ad valorem basis and that it paid the taxes; an extreme case, it would seem, and hardly representative of the prevailing view.

The general method adopted by the state officers in the assessing of property for taxation, as distinguished from an individual instance such as the foregoing, might well be the subject of judicial notice.[59]

The existence and form of all sovereign powers, recognized as such by the executive head of the government, are judicially noticed by the courts. The national flag and seal of each power, as emblems of its sovereignty, are recognized by all other powers, and the judicial branch of each government joins in the recognition.[60]

The courts, however, cannot notice the flag or seal of a government which has not been recognized by the executive, even though the same be a de facto government.[61]

In Taylor v. Barclay [62] the question arose on demurrer as follows: A. brings an action against X. for discovery. "The bill alleges that X. represented himself to be the agent of the federal republic of Central America, which was a sovereign and independent state, recognized and treated as such by his majesty the king of these realms." Upon a demurrer the court will take judicial notice of "public matters which affect the government of the country," and will inform itself as to the truth of the allegation by inquiry of the foreign office, and then act on such information without regard to the fact as alleged.[63]

In America the proclamations of the President,[64] and in Eng-

[59] Wray v. Railroad Co., 113 Tenn. 544, 82 S. W. 471, where it was held that "the court knows judicially and as a part of the financial history of the state that land is never assessed for purposes of taxation at its real cash market value."

[60] The Santissima Trinidad St. Ander, 7 Wheat. (U. S.) 283, 5 L. Ed. 454; Griswold v. Pitcairn, 2 Conn. 90; Lincoln v. Battelle, 6 Wend. (N. Y.) 476; Schoerken v. Swift & Courtney & Beecher Co. (C. C.) 19 Blatchf. 209, 7 Fed. 469.

[61] U. S. v. Palmer, 3 Wheat. (U. S.) 610, 4 L. Ed. 471; City of Berne v. Bank of England, 9 Ves. 347; Dolder v. Lord Huntingfield, 11 Ves. 283.

[62] (1828) 2 Sim. 213.

[63] Thompson v. Powles, 2 Sim. 194.

[64] Cuyler v. Ferrill, 1 Abb. (U. S.) 169, Fed. Cas. No. 3,523; The

land royal proclamations,[65] are judicially noticed. The different states notice proclamations of their respective Governors, as well as proclamations of the President.[66] Other executive acts, such as rules prescribed by the heads of different departments of government, are noticed.[67] Treaties, whether made with foreign governments, or with Indian tribes within the borders of the United States, are the subject of judicial notice both by federal and state courts.[68]

Passing, now, to the second division of facts of which courts are bound to take judicial notice, we find a somewhat different principle for the application of the rule, namely, that of universal recognition.

MATTERS RELATING TO THE PHENOMENA OF NATURE.

25. Certain facts in nature and the physical sciences are so well established, and have become so much a part of our habits of thought and the ordering of our lives, that no one disputes them. To require proof of them would be absurd. The judges assume these facts, just as all men do, and act and think in accordance with them.

Human experience is made up of a vast quantity of facts, incapable of dispute, concerning the things about us. We assume such facts in our thoughts and actions, and it would be absurd for the court to pretend an ignorance of them. Most of the facts which are thus assumed have never been, and never

Greathouse Case, 2 Abb. (U. S.) 382, Fed. Cas. No. 5,741; U. S. v. Fifteen Hundred Bales of Cotton, 10 Int. Rev. Rec. 382; Armstrong v. U. S., 13 Wall. (U. S.) 154, 20 L. Ed. 614.

[65] Wells v. Williams, 1 Ld. Raym. 283, 1 Salk. 46; Dupays v. Shepherd, 12 Mod. 216; Rex v. Sutton, 4 Maule & S. 532.

[66] Dowdell v. State, 58 Ind. 333.

[67] Zevely v. Weimer, 5 Ind. T. 646, 82 S. W. 941, 949; U. S. v. Williams, 6 Mont. 379, 12 Pac. 851; Low v. Hanson, 72 Me. 104.

The United States Census and State school census were noticed in Kokes v. State, 55 Neb. 691, 76 N. W. 467.

[68] Montgomery v. Deeley, 3 Wis. 709; Hauenstein v. Lynham, 100 U. S. 483, 25 L. Ed. 628; Doe v. Braden, 16 How. (U. S.) 635, 14 L. Ed. 1090; U. S. v. The Peggy, 1 Cranch (U. S.) 103, 2 L. Ed. 49; U. S. v. Payne (D. C.) 2 McCrary, 289, 8 Fed. 883; Wilson v. Wall, 6 Wall. (U.

will be, the subject of judicial decision, as it is only those, which are, as it were, on the border, concerning which any question is likely to arise. To take a concrete example of what is meant, let us suppose that the fact to be proved is that a spark from X.'s engine set fire to A.'s house; that B., a witness, has testified that he saw sparks carried by the wind from the engine to some dry leaves about the house; that he saw M. attempt to pick up one or two of the sparks, and hastily drop them, on which account he knew them to be hot. It would be manifestly ridiculous to require proof that B.'s eyes were the normal eyes of a human being; that the eye is capable of receiving certain impressions, which are transmitted by means of the optic nerve to the brain, resulting in the phenomena called "sight"; that sight is one of the senses upon which man is obliged to rely for his knowledge of things about him. It would be equally ridiculous to require proof that men are possessed of certain nerves which are sensitive to heat and cold; that extreme heat, when in contact with these nerves, produces a painful sensation; that it is the habit of man to drop or let go of a thing which is producing a painful sensation. These are all facts which the court must assume, to make use of the facts which the witness is permitted to state.

The law of gravitation, certain qualities and properties of matter, the nature and effects of heat, cold, light, etc., are some of the illustrations of such facts. The time the sun sets on any particular day has been held not to be the subject of proof.[69]

In Scanlan v. Railroad Co.* it was held the court take notice of the laws of nature, and that the principles of mathematics are a part of the same, and how the contents of a regular prismoidal body is ascertained.

The division of time into days, months, and years, and the coincidence of days and dates, are not the subject of proof,

S.) 83, 18 L. Ed. 727; Dole v. Wilson, 16 Minn. 525 (Gil. 472); U. S. v. Reynes, 9 How. (U. S.) 127, 13 L. Ed. 74; Godfrey v. Godfrey, 17 Ind. 6, 79 Am. Dec. 448; Myers v. Mathis, 2 Ind. T. 3, 46 S. W. 178.

The treaty of Paris between the United States and Spain was judicially noticed in La Rue v. Insurance Co., 68 Kan. 539, 75 Pac. 494.

[69] Louisville & N. R. Co. v. Brinkerhoff, 119 Ala. 606, 24 South. 892, *55 Pac. 694 (Cal.).

though the court will itself refer, or permit reference, to an almanac, to definitely ascertain the facts.[70]

That the storage of large quantities of fireworks increases the risk from fire is so self-evident as to be outside the realm of proof.[71]

That it is more dangerous to be on the running board of a street car than to be on the seat or on the platform has been judicially assumed, and is a good illustration of the kind of facts above referred to.[72]

MATTERS RELATING TO LIVES OF MANKIND.

25½. The range of facts of which the courts may, in their discretion, take judicial notice, is very extensive; but underlying it is the single principle of common notoriety, as distinguished from universal recognition.

Common law—that is, the decisions of the courts—has established certain classes of matters which the courts in their discretion may notice.

In passing to these classes of things, it is, in the first place, noticeable that the principle of common notoriety, above referred to, exercises a large influence in determining the action of the court. The court is intelligent. It is cognizant of what is notorious in the community, and it will not always shut its eyes to such notoriety, when it becomes material in the trial of a case.[73] While common notoriety is not sufficient to place a

[70] State v. Morris, 47 Conn. 180; Rodgers v. State, 50 Ala. 102; Philadelphia, W. & B. R. Co. v. Lehman, 56 Md. 209, 40 Am. Rep. 415; McIntosh v. Lee, 57 Iowa, 356, 10 N. W. 895; Curtis v. March, 4 Jur. (N. S.) 1112.

[71] Betcher v. Insurance Co., 78 Minn. 240, 80 N. W. 971. See, also, City of Chicago v. Murdoch, 113 Ill. App. 656, where the court noticed that the use of dynamite in the construction of a tunnel under a populous city is inherently dangerous.

[72] Bridges v. Electric Ry. & Light Co., 86 Miss. 584, 38 South. 788.

[73] In Consumers' Gas Trust Co. v. Littler, 162 Ind. 326, 70 N. E. 365, the court say: "We judicially know as a matter of common knowledge that gas or oil does not exist in paying quantities under all the lands within the recognized district, and that there is no other generally acknowledged way than putting down a well to determine whether or not it does exist"—an excellent example of facts of purely

fact in the category of things of which notice must be taken, the cases show that courts have frequently considered themselves justified, by reason of it, in dispensing with proof.

There are different sorts of notoriety. A fact may be notorious in the sense that it is a universally accepted truth in some art or science. Again, a fact may be notorious in that it is present in the minds of a whole community at the same time, though in a month or a year it may be forgotten. The former sort of notoriety is not the notoriety of which we speak when we are talking of what facts the courts "may" judicially notice, as distinguished from "must." If a fact is so generally accepted and known as a truth that it cannot be seriously disputed, such as some of the facts of nature,[74] or of human life and action, such notoriety throws it with the things of which the court must take notice. If it is not generally accepted and known in this way, and is not a fact with that other sort of notoriety which makes it in every one's mouth at the same time, then it is not a fact of which the courts either must or may take notice. There is some confusion in the cases in respect to the bearing of notoriety upon the scope of judicial notice, mainly because the word is used in this double sense. "Notoriety," used in the first sense, is not notoriety, but universal recognition.

It must be noticed that the quality of universal recognition is not a quality which is unalterably attached to certain facts. In Galileo's time the courts must have judicially noticed that the world was flat and immovable, while it is quite certain that no one at present would be put to proof of the fact that the world is round and moves. As knowledge advances, and facts which were only known to the scientist become the common property

local notoriety, yet quite properly the subject of judicial notice in the courts of that section. See, also, State ex rel. City of Indianapolis v. Indianapolis Gas Co., 163 Ind. 48, 71 N. E. 139.

[74] In Barr v. Cardiff, 32 Tex. Civ. App. 495, 75 S. W. 341, the court judicially noticed that rice cannot be planted, cultivated, and grown to maturity without water, and cited as precedents several of the leading cases on this subject: Loeb v. Richardson, 74 Ala. 311, where the court took notice of the date of maturity of the cotton crop; Floyd v. Ricks, 14 Ark. 286, 58 Am. Dec. 374, where the general course of agriculture was noticed; Dixon v. Niccolls, 39 Ill. 372, 89 Am. Dec. 312, where facts in nature of unvarying occurrence were held to be properly noticed.

of mankind, the scope of judicial notice enlarges, and what, yesterday, would have required proof, to-day is assumed as a matter of common knowledge.

The common knowledge which will justify a court in taking judicial notice of a fact must be common throughout the jurisdiction of such court, and cannot be local to a single community.[75]

The classes of facts included under section 25 are not separated by any well-defined line from many facts of similar nature concerning which the rule is not well established requiring judicial notice to be taken, but which are many times, in the discretion of the court, so noticed. To the consideration of this latter class of facts we shall now pass.

The realm of physical laws offers many illustrations of facts concerning which it is difficult to say that the court must take judicial notice, and yet as to which the exercise of this function seems eminently proper. In one case evidence was introduced showing certain services which a child of two years was accustomed to perform; but the court disregarded the evidence, holding that judicial notice would be taken that a child of such

[75] Viemeister v. White, 179 N. Y. 235, 72 N. E. 97, 70 L. R. A. 796, 103 Am. St. Rep. 859. Here the court noticed that it was the common belief of the people of the state that vaccination is a preventive of smallpox, and upheld the constitutionality of the law requiring vaccination. Judge Vann says: "While the power to take judicial notice is to be exercised with caution, and due care taken to see that the subject comes within the limits of common knowledge, still when, according to the memory and conscience of the judge, instructed by recourse to such sources of information as he deems trustworthy, the matter is clearly within those limits, the power may be exercised by treating the fact as proved without allegation or proof. * * * Common belief, in order to become such common knowledge as to be judicially noticed by us, must be common in this state, although in a matter pertaining to science it may be strengthened somewhat by the general acceptance of mankind. As was said by Mr. Justice Swayne, in Brown v. Piper, 91 U. S. 37, 42, 23 L. Ed. 200: 'Courts will take notice of whatever is generally known within the limits of their jurisdiction, and if the judge's memory is at fault he may refresh it by resorting to any means for that purpose which he deems safe and proper.' * * * While we do not decide and cannot decide that vaccination is a preventive of smallpox, we take judicial notice of the fact that this is the common belief of the people of the state."

tender years was incapable of rendering such services as would lay a basis for recovery of damages.[76]

The following is a good example of the notice of a scientific principle: A. asks an injunction against X., restraining him from infringing A.'s patent, which relates to the preserving of fish "in a close chamber by means of a freezing mixture having no contact with the atmosphere of the preserving chamber." Though not set up as a defense, the court will take judicial notice of the principle of the ice-cream freezer, as the same as claimed by A.'s patent, and will hold the patent void, upon the ground that "it is a thing in the common knowledge and use of the people throughout the country." [77]

This is one of the most striking illustrations under the head of judicial notice. Without proof or allegation in the pleading, the court practically created a defense which defeated the plaintiff's claim, simply by assuming without proof certain facts.[78]

Where there was no proof in the record as to the character of cigarettes, and the question was whether they were legiti-

[76] Southern Ry. Co. v. Covenia, 100 Ga. 46, 29 S. E. 219, 40 L. R. A. 253, 62 Am. St. Rep. 312.

[77] Brown v. Piper (1875) 91 U. S. 37, 23 L. Ed. 200. For other examples of the notice of scientific facts, see Carmon v. State, 18 Ind. 450; Eagan v. State, 53 Ind. 162; Com. v. Pecham, 2 Gray (Mass.) 514; Bryan v. Beckley, Litt. Sel. Cas. (Ky.) 91, 12 Am. Dec. 276; Fenton v. State, 100 Ind. 598—where the intoxicating character of spirituous liquors was noticed. Character of lager beer: Watson v. State, 55 Ala. 158; State v. Goyette, 11 R. I. 592; Briffitt v. State, 58 Wis. 39, 16 N. W. 39, 46 Am. Rep. 621; Inflammability of kerosene: Wood v. Northwestern Ins. Co., 46 N. Y. 421; State v. Hayes, 78 Mo. 307. Compare Mears v. Humboldt Ins. Co., 92 Pa. St. 15, 37 Am. Rep. 647; Photographic process: Luke v. Calhoun Co., 52 Ala. 115.

It is doubtful, however, if the dictum contained in a recent New York case represents a correct view as to the application of the doctrine to scientific facts. In the case referred to the judge, though there was uncontradicted evidence to establish the fact, expresses the view that "a court may take judicial notice of the scientific fact that one-tenth of a grain of morphine could not have poisoned the plaintiff." This seems an extreme view. Laturen v. Bolton Drug Co. (Sup.) 93 N. Y. Supp. 1035.

[78] See, also, Roberts v. Bennett, 136 Fed. 193, 69 C. C. A. 533, where the court reversed a judgment given below in favor of the plaintiff, holding that judicial notice of the ordinary appearance of

mate articles of commerce, the court held judicial notice would be taken that "their use is always harmful, never beneficial. They possess no virtues, but are inherently bad, and bad only. * * * Their every tendency is toward the impairment of physical health and mental vigor." [79]

Facts in mechanical construction, such as the fact that "no engine can be so constructed that some sparks will not escape," [80] come under this head; also facts with relation to the different seasons, and their relation to agriculture. For example, the court has taken notice of the fact that grass cannot be cut and made into hay after the month of September; [81] that corn is mature in the month of December; [82] and that cotton is not planted until after January; [83] various business customs; [84]

the conventional bushel basket was sufficient to justify the disregard of the presumption of novelty arising from the grant of the patent; another case of the recognition of a defense not set up by the defendant.

[79] Austin v. State, 101 Tenn. 563, 48 S. W. 305, 50 L. R. A. 478, 70 Am. St. Rep. 703. Other striking cases where facts of nature or the physical sciences have been noticed are: Moore v. Saginaw, T. & H. R. Co., 115 Mich. 103, 72 N. W. 1112, in which the effect of the jolting occasioned by shifting of cars at stations upon the equilibrium of a passenger was noticed; Ex parte Kair, 28 Nev. 127, 80 Pac. 463, where the court took notice that prolonged labor in underground mines was injurious to health; Lidwinopsky's Petition, 7 Pa. Dec. 188, where certain facts in human anatomy were the subject of notice.

For a very excellent discussion of the principles underlying the application of the doctrine to this class of cases, see Hunter v. New York, O. & W. R. Co., 116 N. Y. 621, 23 N. E. 9, 6 L. R. A. 246. See, also, Leovy v. U. S., 177 U. S. 621, 20 Sup. Ct. 797, 44 L. Ed. 914.

[80] White v. New York Cent. & N. H. R. R. Co., 90 App. Div. 356, 85 N. Y. Supp. 497; Kleffmann v. Dry Dock, E. B. & B. R. Co., 104 App. Div. 416, 93 N. Y. Supp. 741, where the court noticed judicially the construction of an ordinary street car.

[81] Raridan v. Central Iowa R. Co., 69 Iowa, 527, 29 N. W. 599.

[82] Garth v. Caldwell, 72 Mo. 622.

[83] Wetzler v. Kelly, 83 Ala. 440, 3 South. 747. See, also, Floyd v. Ricks, 14 Ark. 286, 58 Am. Dec. 374; Dixon v. Niccolls, 39 Ill. 373, 89 Am. Dec. 312; Patterson v. McCausland, 3 Bland (Md.) 69; Tomlinson v. Greenfield, 31 Ark. 557; Ross v. Boswell, 60 Ind. 235; Loeb v. Richardson, 74 Ala. 311; Mahoney v. Aurrecochea, 51 Cal. 429; State v. Morris, 47 Conn. 180; Person v. Wright, 35 Ark. 169; Plano Mfg. Co. v. Cunningham, 73 Mo. App. 376.

[84] As to the charging of interest: Watt v. Hoch, 25 Pa. 411. As to

the established weights and measures;[85] the meaning of words and abbreviations.[86]

The things of which the court may, in its discretion, take judicial notice, can scarcely be classified, so diverse are they in character and in effect. It has already been said that the principle which governs the action of the court in respect to these facts is notoriety, as distinguished from universal recognition. The question of whether sufficient notoriety attaches to any particular fact to make it safe and proper to assume it without proof is always the vital question. The authorities show little tendency on the part of the courts to overstep the limits of prudence in the exercise of that discretion, and a broader application of the principle of judicial notice in many cases would have furthered the cause of justice.[87] In every case the particular circumstances must govern, and no general rule can

the passing of carriages when they meet on the road: Turley v. Thomas, 8 Car. & P. 104. As to marine customs: The Scotia, 14 Wall. (U. S.) 170, 20 L. Ed. 822. As to mutual credits between merchants: Cameron v. Blackman, 39 Mich. 108. As to collection of bills and notes: Lee v. Chillicothe Bank, 1 Biss. (U. S.) 325, Fed. Cas. No. 8,187. Usage of banks: British & American Mortg. Co. v. Tibballs, 63 Iowa, 468, 19 N. W. 319. As to custom of undervaluation of real estate, when assessed for tax purposes: Railroad & Telephone Cos. v. Board of Equalizers (C. C.) 85 Fed. 302. As to methods of selling crushed stone: Duby v. Jackson, 69 Minn. 342, 72 N. W. 568. As to difference between a wholesaler and manufacturer as understood in trade: Kansas City v. Butt, 88 Mo. App. 237. As to reading of Bible in public schools: Pfeiffer v. Board of Education, 118 Mich. 560, 77 N. W. 250, 42 L. R. A. 536.

[85] Mays v. Jennings, 4 Humph. (Tenn.) 102.

[86] Abbreviation "C. O. D.": State v. Intoxicating Liquors, 73 Me. 278; United States Express Co. v. Keefer, 59 Ind. 263; Paris v. Lewis, 85 Ill. 597. "P. M." and "A. M.": Hedderich v. State, 101 Ind. 564, 1 N. E. 47, 51 Am. Rep. 768. Meaning of words: Smith v. Clayton, 29 N. J. Law, 357; Watson v. State, 55 Ala. 158. "F. O. B.": Vogt v. Shlenebeck, 122 Wis. 491, 100 N. W. 820, 67 L. R. A. 756, 106 Am. St. Rep. 989; "Secs. 23, 38, 14": McChesney v. City of Chicago, 173 Ill. 75, 50 N. E. 191.

[87] In Ellis v. Park, 8 Tex. 205, the court refused to take judicial notice that "St. Louis, Mo.," meant "St. Louis, Missouri," and in Accola v. Chicago, B. & Q. Ry. Co., 70 Iowa, 185, 30 N. W. 503, refused to notice that "C., B. & Q. R. R. Co." meant "Chicago, Burlington and Quincy Railroad Company." In both of these cases, it seems, the court stopped short of a reasonable exercise of its discretion.

be laid down. The decisions in particular cases are only useful as they serve to furnish illustrations from which we can argue by analogy. They are not useful as precedents, inasmuch as the same facts may at a different time, and under different circumstances, be entitled to different treatment.

As an interesting illustration of one of this class of cases, where the court did not deem it proper to exercise its right to notice without proof, the following will serve: A. sues X. as acceptor of a bill of exchange, and alleges in his declaration that he drew a bill at Dublin, directed to X., for the sum of £542. 10s. 8d., which X., at Dublin, accepted. At the trial the proof showed that the bill was drawn and accepted in Dublin, Ireland. X. claimed a variance, in that the proof did not conform to the pleading, as £542. 10s. 8d. in Irish money amounted to only £500. 7s. 9d. in English, and the declaration did not show that the bill referred to the former. The question was whether or not the court would take judicial notice of the fact that Dublin, as mentioned in the description of the bill of exchange contained in the declaration, was in Ireland. Held, "it is not possible for the court to take judicial notice that there is only one Dublin in the world." [88]

In Michigan the court has taken judicial notice of a street-car strike in Detroit within a year or two previous to the trial; [89] in Maine the difference between the three customary surveys of logs on the waters of the Penobscot river has been noticed.[90]

In Peters v. Fleming [91] the court took judicial notice that it was prima facie not unreasonable that an undergraduate at college should have a watch, and consequently a watch chain, and that, therefore, it was a question for a jury whether the watch chain supplied on credit in that particular case was such a watch chain as was necessary to support himself prop-

[88] Kearney v. Rex (1819) 2 Barn. & Ald. 301.

[89] Geist v. Railroad, 91 Mich. 446, 51 N. W. 1112.

[90] Putnam v. White, 76 Me. 551. Certain new methods of doing business have been held a proper, though not necessary, subject of judicial notice. Gregory v. Wendell, 39 Mich. 337, 33 Am. Rep. 390; Adams Mining Co. v. Senter, 26 Mich. 73; Davis v. Kobe, 36 Minn. 214, 30 N. W. 662, 1 Am. St. Rep. 663.

[91] 6 Mees. & W. 42.

erly in his degree. Upon the trial of X. for murder, it became material for the state to prove at what hour the moon rose on the night of Saturday, the 9th of August, 1879. Gruber's Almanac for the year 1879 was offered in evidence. Although the statement by some one of a mere calculation that the moon would rise at a certain hour and minute, it is admissible, not as furnishing logical proof of the time at which it did in fact rise, but upon the theory that the court will take judicial notice of the fact that almanacs are sources upon which the world relies for its information as to such facts, and will therefore adopt the same source for its information.[92]

The custom of banks closing at 3 o'clock has been held a proper subject of judicial notice;[93] so, also, the management of railroads.[94]

Many historical facts of general, and even sometimes of local, character, are judicially noticed.[95] It is a matter of sound discretion with the court to decide when a fact is of sufficient notoriety to be assumed without proof. It may be said that in respect to certain salient facts in the history of an entire country, facts which have affected the progress[96] and wel-

[92] Munshower v. State (1880) 55 Md. 11, 39 Am. Rep. 414. It may be more correct to say that the primary fact of which the court takes judicial notice is the time when the moon arose, and that it permits the use of the almanac for its information upon the further application of the principle of judicial notice above stated. Ante, p. 22.

[93] Merchants' Nat. Bank of Whitehall v. Hall, 83 N. Y. 338, 38 Am. Rep. 434.

[94] Evansville & C. R. Co. v. Smith, 65 Ind. 92; South & N. Ala. R. Co. v. Pilgreen, 62 Ala. 305.

[95] In State v. Atlantic Coast Line R. R. Co. the court noticed that phosphate is produced in some portions of Florida and is an article of transportation. Conde v. City of Schenectady, 29 App. Div. 604, 51 N. Y. Supp. 854.

[96] As to what states seceded, and what remained loyal: Perkins v. Rogers, 35 Ind. 124, 9 Am. Rep. 639. Ceding of land by one state to another: People v. Snyder, 41 N. Y. 397. Existence of civil war: Swinnerton v. Columbian Ins. Co., 37 N. Y. 174, 93 Am. Dec. 560. The Prize Cases, 2 Black (U. S.) 635, 17 L. Ed. 459. That the state of Maryland embraces part of the original English colonies of America: Frank v. Gump, 104 Va. 306, 51 S. E. 358. That the great grain fields of the country lie west of the Hudson river: Bradley v. Gorham, 77

fare of the entire people, judicial notice is proper; but, in the main, how far the courts will exercise this power is a matter of discretion.[97]

An interesting example of the exercise by the court of its discretionary power is found in a recent Western case, where the facts of existence of an insurrection in the Philippines in 1898, and that at a certain date later the insurrection in the Island of Mindanao had ceased, were judicially noticed.[98]

The limits which the courts have laid down to the application of this principle are not always consistent, and an attempt to reconcile the many decisions would prove as impracticable as useless. Judicial notice is not a substitute for proof, nor a means to strengthen a weak case. There are doubtless instances of its too extensive as well as too narrow application, but in the main the decisions may be said to follow the lines above laid down.[99]

Conn. 211, 58 A. 698, 66 L. R. A. 934. As to the date of opening of a trunk line railway: Knowlton v. Railroad Co., 72 Conn. 188, 44 Atl. 8. As to early colonial history of Massachusetts: Blethan v. Bonner (Tex. Civ. App.) 52 S. W. 571.

[97] Separation of Methodist Episcopal Church into two branches in 1844: Humphrey v. Burnside, 4 Bush. (Ky.) 215. Existence of a certain public sentiment at a particular time: Stout v. Board Com'rs, 107 Ind. 343, 8 N. E. 222; Hanes v. Herman, 78 Mo. 628. Existence of "hard times": Ashley v. Martin, 50 Ala. 537. Career of Fremont in California: De Celis' Adm'r v. U. S., 13 Ct. Cl. 117. Sherman's march to the sea: Williams v. State, 67 Ga. 260. That the Columbian Exposition was held in Chicago is a historical fact: Osgood v. Skinner, 186 Ill. 491, 57 N. E. 1043.

[98] La Rue v. Kans. Mut. Life Ins. Co., 68 Kan. 539, 75 Pac. 494.

[99] The following are a few of the more striking cases where the courts have refused to apply the principle: As to the merits or defects of oleomargarine: Northwestern Manuf'g Co. v. Wayne Circuit Judge, 58 Mich. 381, 25 N. W. 372, 55 Am. Rep. 693. As to the effect of the habit of smoking cigars: Mueller v. State, 76 Ind. 310, 40 Am. Rep. 245. But see Austin v. State, 101 Tenn. 563, 48 S. W. 305, 50 L. R. A. 478, 70 Am. St. Rep. 703. As to an individual inhabitant of a seceding state remaining loyal to the United States: Perkins v. Rogers, 35 Ind. 124, 9 Am. Rep. 639. As to whether concentric circles in the trunk of a tree mark each year's growth: Patterson v. McCausland, 3 Bland (Md.) 69. As to meaning of "St. Louis, Mo.." Ellis v. Park, 8 Tex. 205; "New Orleans, La.," Russell v. Martin, 15 Tex. 238. These two cases seem to be clearly within the principle

that the court should notice ordinary abbreviations, and, it is believed, would not be followed, except in the jurisdiction where they have made the law. The court refused to take notice, as being a matter of common knowledge, that the rights of way of railroad companies are fenced as the track is constructed. C. & M. Elec. R. Co. v. Diver, 213 Ill. 26, 72 N. E. 758. In a recent case, where the question of the civil rights of the Roman Catholic Church arose, the court say: "Judicial notice is to be taken with caution, and every reasonable doubt as to the propriety of its exercise in a given case should be resolved against it. The general practice is to require proof regarding church rights and powers." Baxter v. McDonnell, 155 N. Y. 83, 49 N. E. 667, 40 L. R. A. 670. To same effect, Hill Estate Co. v. Whittlesey, 21 Wash. 142, 57 Pac. 345. But see Potter v. New York Evening Journal Publishing Co., 68 App. Div. 95, 74 N. Y. Supp. 317.

End of 2.

CHAPTER III.

QUESTIONS OF LAW AND QUESTIONS OF FACT.

26. In General.
27. Questions of Law Defined.
28. Questions of Fact Defined.
29. Province of Court and Jury.

IN GENERAL.

26. The questions which arise for determination in the trial of a case have been divided into two classes:
(a) Questions of law, and
(b) Questions of fact.

The distinction is one which has been universally made, but not always with a uniform meaning. It is well to understand at the start in just what sense these terms "questions of law" and "questions of fact" will be used. Under the common-law system, the trial of a case involved its submission to a double-headed tribunal,—a tribunal composed of the judge and the jury. The result of this method of procedure was a separation of the work of the judge from that of the jury, and a constant struggle by the courts to define accurately the peculiar province of each. The idea was early developed that the court was concerned with the law, and the jury with the facts, of the case; and that general rule, so often quoted, came about, that questions of law are for the judge and questions of fact for the jury. This implied a fundamental distinction between questions of law and questions of fact. Such a distinction exists, and, as long as the inherent quality of a question is made the test of its character as a question of law or a question of fact, the distinction is a sensible one. But the general rule quoted above was never strictly true; for, while, in the main, questions of law were for the judge, and questions of fact for the jury, it was not true that all questions of law were for the judge, nor all questions of fact for the jury.[1] Yet

[1] Bartlett v. Smith, 11 Mees. & W. 483; Bennison v. Jewison, 12 Jur. 485.

it was so understood, and from this understanding arose the conception that the converse of the rule was true,—that any question which was for the judge must necessarily be a question of law, and any question which was for the jury must of necessity be a question of fact; hence the conception that questions of law meant any questions decided by the judge, and questions of fact any questions decided by the jury.[2] It is just this idea which the mind should be free from in considering the respective provinces of court and jury. What is meant by a question of law is that which by itself, without reference to whether it is determined by judge or jury, has a distinctive character which makes it such. The same is true of the meaning of questions of fact.

QUESTIONS OF LAW DEFINED.

27. Wherever the thing to be determined involves the application of some principle of the statute or common law, we have a question of law.

Questions of law do not arise except upon and after the determination of questions of fact. They are predicated upon the existence of facts, and deal with their effect. Given certain facts, and the question whether they constitute a contract is a question of law. In the case of a suit for malicious prosecution, the questions as to what the circumstances were which attended the prosecution are questions of fact, and are determined

[2] Hamilton v. Insurance Co., 136 U. S. 255, 10 Sup. Ct. 945, 34 L. Ed. 419. Report of Criminal Code Bill Commission, Draft Code, § 74, where it is said: "The question whether an act done or omitted with intent to commit an offense is, or is not, only preparation, and too remote to constitute an attempt, is a question of law."

In an analysis of the distinction between law and fact, a writer in 12 Harvard Law Review, 545, comes to precisely this conclusion, and expressly dissents from the theory laid down by Prof. James B. Thayer in his "Preliminary Treatise on Evidence at the Common Law." The distinction which Prof. Thayer finds seems founded upon a scientific treatment of the subject, while the theory put forth by the writer referred to makes a purely arbitrary division, which lends itself to no useful purpose in its application to the many cases which involve the determination of the question.

by the jury. The law as to what constitutes reasonable and probable cause, as laid down in the decisions, is explained to the jury by the judge. The jury then determines whether, in the particular case under consideration, the facts as it finds them to exist constitute reasonable and probable cause, as defined by the judge. We thus have the jury determining two questions: First, what the facts are; second, whether the facts bring the case within a certain rule laid down by the judge as to their effect. In determining the first question, the jury is free to act as it pleases. In determining the second, it is bound to follow the instruction given by the judge. Assume, for example, that the jury finds that the defendant caused the arrest of the plaintiff in good faith, honestly supposing that the plaintiff had stolen his property, but that no reasonable man, from the circumstances surrounding the transaction, would have been justified in believing that the plaintiff was the criminal. The judge having explained to the jury what the law is, that malice means simply a want of reasonable and probable cause, and that reasonable and probable cause means such cause as would have justified a reasonable and prudent man in acting, the jury would be bound to conclude that the facts found by it were not sufficient to bring the case within the rule as laid down by the judge, and would therefore find a verdict for the plaintiff. In such a case, the jury has, by virtue of its own powers, determined the facts, and, as the exponent of the judge and in accordance with his instructions, formally expressed by its verdict the determination of the question of law. Had it found a special verdict reciting the facts, and the judge then directed the judgment in accordance with his conclusions as to the law from the facts, the two questions would have been more visibly, though not more completely, separated.[3]

[3] In Com. v. Porter, 10 Metc. (Mass.) 263 (1846), Shaw, C. J., discusses fully the province of court and jury in criminal trials, the question arising upon the contention that counsel for defendant had no right to address the jury on a question of law. He comes to the following conclusions: "The question, then, recurs, in case the jury return a general verdict, how is the law to be decided by the court when, as we have seen, it is to be declared by the jury, as involved in the general verdict? As both questions are involved in the verdict, the appearance on the record is that both are decided by the jury, because both are declared by them. But this is in appearance only,

It is to be observed that the facts found by the jury in a case of this sort, and indeed in almost every case, are of two kinds: (1) Those for the proof of which evidence is adduced, upon which evidence alone the jury must rely in its conclusions; such as, what the plaintiff said and did, and what the de-

and can scarcely mislead those who are acquainted with the practice of the courts of justice in criminal trials, though it has sometimes led to the argument that because they must, in a general verdict, declare the rule of law on which it rests, they have power to pass upon it, and therefore a rightful authority to decide upon it. * * * On the whole subject, the views of the court may be summarily expressed in the following propositions: That in all criminal cases it is competent for the jury, if they see fit, to decide upon all questions of fact embraced in the issue, and to refer the law arising thereon to the court, in the form of a special verdict. But it is optional with the jury thus to return a special verdict or not, and it is within their legitimate province and power to return a general verdict, if they see fit. In thus rendering a general verdict, the jury must necessarily pass upon the whole issue, compounded of the law and fact, and they may thus incidentally pass on questions of law. And if, in the progress of the trial, or the summing up and charge to the jury, the court should express or intimate any opinion upon any such question of fact, it is within the legitimate province of the jury to revise, reconsider, and decide contrary to such opinion, if, in their judgment, it is not correct and warranted by the evidence. But it is the duty of the court to instruct the jury on all questions of law which appear to arise in the cause, and also upon all questions pertinent to the issue upon which either party may request the direction of the court upon matters of law. And it is the duty of the jury to receive the law from the court, and to conform their judgment and decision to such instructions as far as they understand them, in applying the law to the facts to be found by them; and it is not within the legitimate province of the jury to revise, reconsider, or decide contrary to such opinion or direction of the court in matters of law. * * * It is within the legitimate power, and is the duty, of the court, to superintend the course of the trial; to decide upon the admission and rejection of evidence; to decide upon the use of any books, papers, documents, cases, or works of supposed authority which may be offered upon either side; to decide upon all collateral and incidental proceedings; and to confine parties and counsel to the matters within the issue. As the jury have a legitimate power to return a general verdict, and in that case must pass upon the whole issue, this court are of the opinion that the defendant has a right by himself or his counsel to address the jury, under the general superintendence of the court, upon all the material questions involved in the issue, and, to this extent and in this connection, to address the jury upon such questions of law as come within the issue to be tried."

fendant did, in respect to the transaction in question. (2) Those for the determination of which the jury must rely upon its own knowledge and experience; for example, what a reasonable man would have done under the same circumstances as have been found to exist. Both classes of facts are plainly for the jury.[4] There is, however, a clear distinction between them. Referring again to the example given, what is reasonable and probable cause is a question of law, and the judge explains it to the jury, using such general language or such specific examples as may serve the purpose best, and make it clear. Whether or not, under the particular circumstances found to exist, a reasonably prudent man would have acted as the defendant did, is a question of fact. A failure to make this distinction has sometimes caused confusion, and given rise to an erroneous idea that in a case of this sort a jury determines the question of law as well as the question of fact. It has also resulted in the mistake of regarding the facts for the consideration of the jury as confined to the physical facts of time, place, and circumstances, and regarding everything else as a question of law for the court.

QUESTIONS OF FACT DEFINED.

28. The question of the existence or nonexistence of a certain state of things or condition is a question of fact.

Questions of fact are more easily recognized than questions of law. In every case the existence of certain things is affirmed by one side, and denied by the other. Evidence is offered by each side, and the jury, or court, where the question of fact is one to be decided by the court, upon the evidence, determines what the facts are. If the jury in questions submitted to it, sometimes seems to go further than this, as is the case whenever a general verdict is given, as distinguished from a special verdict, it is only because of the form of the procedure. In theory, what the jury does is to find the facts, and then to give their verdict in accordance with the law as the judge has explained it to them to be applicable in case the facts are as found.

[4] Thayer, Cas. Ev. (2d Ed.) p. 142.

PROVINCE OF COURT AND JURY.

29. In no case can it properly be said that the jury determines a question of law. The judge, however, does, in certain cases, determine questions of fact.

With respect to the main facts in issue the judge has nothing to do, in the sense of determining their existence, but there are certain preliminary and collateral questions of fact which are exclusively within the province of the judge, and with which the jury has nothing to do. Many of these questions relate to the admission of evidence, to the competency of witnesses, and to the conduct of the trial in other respects.[5] In the determination of questions of this sort the court cannot seek the aid of a referee, any more than he can that of the jury. He alone must pass upon the question, from evidence submitted to him in open court.[6]

It may be thought that the power which the judge exercises in determining whether enough evidence has been introduced upon any fact in issue to justify submitting the ques-

[5] Facts preliminary to the admissibility of evidence. Com. v. Coe, 115 Mass. 481, 504, 505; Com. v. Robinson, 146 Mass. 571, 581, 16 N. E. 452; Dole v. Johnson, 50 N. H. 452, 459. Whether a person is qualified to testify as an expert is a preliminary question of fact for the court. Nelson v. Sun Mut. Ins. Co., 71 N. Y. 453; State v. Cole, 94 N. C. 958, 964. Whether a confession is voluntary, and therefore admissible. Murphy v. People, 63 N. Y. 590, 597; Ellis v. State, 65 Miss. 44, 3 South. 188, 7 Am. St. Rep. 634. Whether a witness possesses sufficient intelligence to testify—Com. v. Mullins, 2 Allen (Mass.) 295; Peterson v. State, 47 Ga. 524—or understands the nature of the oath—Com. v. Lynes, 142 Mass. 577, 580, 8 N. E. 408, 56 Am. Rep. 709.

[6] Simpson v. State, 31 Ind. 90. Here the judge, not being satisfied as to the competency of a child six years old, "appointed two gentlemen, who retired with the child to a private room, and after some time returned, and reported to the court that 'in their opinion her testimony ought to be heard, but received with great allowance.'" She was allowed to testify. The appellate court reversed the judgment, saying: "This determination is judicial. The examination is part of the trial, must be public, and must be made by the court. The decision must be founded upon the opinion of the judge from the examination which he makes. It cannot be referred to some one else to do this, nor can the judge be guided by the opinion of such referee."

tion to the jury is the determination of a question of fact. For example, when a judge decides that there is not sufficient evidence to go to the jury, he apparently determines that the fact sought to be proved does not exist. The question, however, is one of law, and not of fact.[7] This may be easily seen by considering the situation in case the judge determines that there is sufficient evidence to go to the jury. This is not finding that the fact is proved, for the jury is free to find, upon the evidence submitted, either way. As a matter of law, it is established that sufficient evidence must be introduced to justify a jury in finding the existence of the thing sought to be proved before it can be submitted to the jury. In any particular case, what is sufficient evidence to bring the case within the rule is clearly a question of law.

The following example is an illustration of the court being misled into improperly leaving a question to the jury merely because it was a question of fact: A. against X. Assumpsit on a bill of exchange. A. offers the bill in evidence. X. objects, on the ground that it is not properly stamped. On its face, the bill was a foreign bill, and properly stamped. X. claims it, in reality, was an inland bill, and therefore needed a higher stamp. The court admitted the bill, and then allowed evidence to show it was in fact an inland bill, and left it to the jury to say which it was.[8] Lord Abinger, in this case, gives a clear statement of the duty of the judges in respect to questions of fact relating to the admissibility of evidence and the competency of witnesses. "All questions respecting the admissibility of evidence are to be determined by the judge, who ought to receive that evidence, and decide upon it, without any reference to the jury. In all cases where objection is made to the competency of witnesses, any evidence to show their incompetency must be received by the judge, and adjudicated on by him alone." [9]

[7] Sidney School Furniture Co. v. Warsaw School Dist., 122 Pa. 494, 501, 15 Atl. 881, 9 Am. St. Rep. 124; State v. McBryde, 97 N. C. 393, 1 S. E. 925.

[8] Bartlett v. Smith, 11 Mees. & W. 483.

[9] Bartlett v. Smith, 11 Mees. & W., at page 485. See, also, Gorton v. Hadsell, 9 Cush. (Mass.) 511.

A good illustration of the effect of a determination of this preliminary question of law is found in the case of Ryder v. Wombwell.[10]

A. sues X. for value of diamond shirt buttons, and silver goblet, engraved with an inscription. X. pleads infancy, and A. replies that the articles were necessaries. In the absence of any evidence of anything particular in the defendant's station rendering it exceptionally necessary for him to have such articles, the question of whether they were necessaries is really determined by the court's determination of the question of law as to the propriety of submitting the case to the jury. Miller, J., says: "Such a question is one of mixed law and fact. In so far as it is a question of fact, it must be determined by a jury, subject, no doubt, to the control of the court, who may set aside the verdict, and submit the questions to the decision of another jury. But there is in every case, not merely in those arising on a plea of infancy, a preliminary question, which is one of law, viz. whether there is any evidence on which the jury could properly find the question for the party on whom the onus of proof lies. If there is not, the judge ought to withdraw the question from the jury, and direct a nonsuit if the onus is on the plaintiff, or direct the verdict for the plaintiff if the onus is on the defendant. It was formerly considered necessary in all cases to leave the question to the jury if there was any evidence, even though a scintilla, in support of the case; but it is now settled that the question for the judge (subject, of course, to review) is, as stated by Claude, J., in Jewell v. Pare,[11] not whether there is literally no evidence, but whether there is none that ought reasonably to satisfy the jury that the fact sought to be proved is established." [12]

It may even become necessary for the judge to determine the fact of a crime having been committed in the exercise of his function in passing upon the admissibility of evidence. Upon the trial of X. for the murder of A. by poisoning, the prosecution offered, for the purpose of establishing X.'s motive, evidence to prove that, before the death of one B., the

[10] (1868) L. R. 4 Exch. 32.
[11] 13 C. B., at page 916.
[12] Ryder v. Wombwell (1868) L. R. 4 Exch. 32.

wife of A., X. had formed the plan to kill B., then induce A. to make X. the beneficiary under a policy made out in favor of B., and then to kill A. for the purpose of getting the insurance. The question of whether enough evidence has been given of the alleged plan to make testimony, tending to show the death of B. by arsenic, admissible is one of law.

In this connection, an inquiry becomes interesting as to how much evidence will be required before the judge will be justified in finding the fact of its commission,—whether the judge will be bound by the rule applicable to the jury, to wit, that the crime must be proved beyond a reasonable doubt. If the purpose of the inquiry by the judge into the facts be borne in mind, it will be clearly seen that the principle is inapplicable. The judge does not find the fact as an element in the guilt of the accused, but only for the purpose of ascertaining whether, as matter of law, the piece of evidence in question should be submitted to the jury, and hence the fact of the existence of the alleged scheme need not be proved beyond a reasonable doubt in order to render such testimony admissible.[18]

The cases of negligence involve some nice questions as to the respective provinces of court and jury. The cases are not always clear in making the distinction between questions of law and questions of fact. The same element is present in these cases which appears in any case in which the jury must refer to its own standards, acquired from its own experience, as to the reasonable or prudent actions of men. This element

[18] Com. v. Robinson (1888) 146 Mass. 571, 16 N. E. 452. C. Allen, J., says: "But where, in a case like the present, the admissibility of testimony depends upon the determination of some prior fact by the court, there is no rule of law that, in order to render the testimony admissible, such prior fact must be established by a weight of evidence which will amount to a demonstration, and shut out all doubt or question of its existence. It is only necessary that there should be so much evidence as to make it proper to submit the whole evidence to the jury. Ordinarily, questions of fact are exclusively for the jury, and questions of law for the court. But when, in order to pass upon the admissibility of evidence, the determination of a preliminary question of fact is necessary, the court, in the due and orderly course of the trial, must necessarily determine it, as far as is necessary for that purpose, and usually without the assistance, at that stage, of the jury."

has been noticed before in connection with cases for malicious prosecution. In cases for negligence it appears in this shape: Did the defendant act as a reasonably prudent person would have acted under similar circumstances? or, in the case of contributory negligence, did the plaintiff take such precaution to avoid injury as a reasonably prudent person would have taken? These questions are clearly questions of fact, such as the jury must answer, not only from the evidence submitted to it, but also from its own experience and observation as to the actions of men.[14] This is not saying that there are not questions of law connected with the subject of inquiry in a case of negligence. What negligence is; how it must have entered into the occurrence as a cause of the injury; the effect of contributory negligence and its relation, in point of time and in other respects, to the negligence charged against the defendant—all become the subjects of questions of law, which must be explained to the jury by the judge in order that, having answered the questions of fact, the jury may give a proper verdict. Then, too, there is always that preliminary question of law as to whether sufficient evidence has been submitted to make it a proper thing to submit the case to the jury.[15]

[14] Jones v. East Tennessee, V. & G. R. Co. (1888) 128 U. S. 443, 9 Sup. Ct. 118, 32 L. Ed. 478: In an action by A. against X., A. testifies that, being alongside X.'s tracks, he crossed in the usual way; that he could not see an approaching train, because of a car on a side track; and that he listened as he started to cross. There was also testimony to show that A. ran carelessly across the track; that he might have guarded himself against the train if he had stopped long enough to look about him. It was held that the question of whether the plaintiff may not have been as careful as the most cautious and prudent man would have been was a question for the jury.

[15] In Metropolitan Ry. Co. v. Jackson (1877) 3 App. Cas. 193, 200, Lord Chancellor Cairns said: "Your lordships, in the Case of Bridges, did not lay down any new rule upon this subject. Indeed, it is impossible to lay down any rule except that, from any given state of facts, the judge must say whether negligence can legitimately be inferred, and the jury whether it ought to be inferred." Bridges v. North London Ry. Co. (1874) L. R. 7 H. L. 213: A. against X. for negligence. A., a commuter on X.'s railway, when the train came to a stop at what he supposed was his station, alighted. The train had not reached the station, but the conductor had called out the name, and the train had stopped. Afterwards the conductor called out, "Keep your seats!" and the train moved up to the platform. This

In certain cases the judge seems to have exercised the power of determining some of the main facts in issue. The most notable example of this is, perhaps, the case of the interpreta-

was after A. got out. A. fell on a pile of rubbish, and was injured. The station was at the entrance to a tunnel. A part of the platform was in the tunnel. The car from which A. got out was still within the tunnel. It was about dusk, and the tunnel was filled with steam. A. was 52 years old, and nearsighted. No other facts being proved, is the question of negligence a question of fact for the jury? It was held that the preliminary question of law as to whether there was sufficient evidence to justify a jury in finding negligence should be answered in the affirmative, and the facts were therefore for the jury to pass upon. Terre Haute & I. R. Co. v. Voelker (1889) 129 Ill. 540, 22 N. E. 20: A. against X. for negligence in causing death of A.'s husband, M. The proof showed that M. did not stop and look or listen as to approaching trains when he crossed the defendant's tracks. Nothing else being shown, is the question of his negligence a question of law for the court? Mr. Justice Bailey says: "It has been the uniform doctrine of this court that negligence is ordinarily a question of fact for the jury. Doubtless, there may be conduct so clearly and palpably negligent that all reasonable minds, without hesitation, would so pronounce it. When that is so, the inference of negligence may properly be said to be a necessary one, and such conduct may be treated as negligent per se. * * * It is doubtless a rule of law that a person approaching a railway crossing is bound, in so doing, to exercise such care, caution, and circumspection to foresee danger and avoid injury as ordinary prudence would require, having in view all the known dangers of the situation. Just precisely what such requirements would be must manifestly differ with the ever-varying circumstances under which such approach may be made. * * * To omit looking and listening where neither can do any good, as where the track is hidden from sight and other sounds drown the noise of the cars, is not contributory negligence; and there are other circumstances in which the rule of looking and listening cannot, in the nature of this sort of thing, be inflexible. Therefore, to go upon the track in disregard of it is not necessarily, and as a question of law, negligence." Delaware, L. & W. R. Co. v. Converse (1891) 139 U. S. 469, 11 Sup. Ct. 569, 35 L. Ed. 213: A. against X. for injuries caused by negligence of defendant. Proof showed that X., just before crossing a highway with its train of cars, made a flying switch with the rear portion of the train, so that the engine with the first section of cars crossed its highway 100 feet in advance of the rear portion. There was no light on the rear portion, though it was at night, and no means of giving warning. A., after passage of the first section, attempted to cross the track, not being aware of the approach of the second section. The court instructed the jury that the facts showed negligence on the part of X. Justice Harlan says: "Without attempting to for-

tion of written contracts or other documents. The same rule also has been applied in the case of oral agreements, where the terms were precise and explicit.[16]

mulate a general rule applicable in every case of injury to person or property, it is sufficient here to say that the severing of defendant's train of cars in the nighttime, leaving a part of them, uncontrolled otherwise than by ordinary brakes, to run across a public highway, at grade, without some warning, by a flagman or by bell or whistle or in some other effective mode, that they were approaching, was in such obvious disregard of the rights of persons using that highway that the court was justified in saying, as a matter of law, not simply that such facts were evidence of negligence, but that they constituted negligence, upon the part of the company. It was justified in so instructing the jury, because every one knows, and therefore the court knew, that such use of defendant's tracks, where they crossed the country road, unnecessarily endangered the safety of any one who, at the time, crossed the railway tracks while traveling on that highway." In other words, and more correctly expressed, the question of fact is so clear that the judge is justified in applying the rule of law that a fact so clear as not to admit of dispute may be determined by the court. The nature of the question is in no wise changed. Stackus v. New York Cent. & H. R. R. Co. (1880) 79 N. Y. 464: A. against X. for injuries caused by X.'s negligence. A. was crossing X.'s track in a covered buggy, stopped, and looked and listened, but did not let down the buggy top and could only see about 50 rods one way,—east. The train from the east struck his buggy. Church, C. J., says: "The plaintiff was nonsuited upon the ground that he was guilty of negligence which contributed to the injury. To justify this, the negligence must appear so clearly that no construction of the evidence, or inference drawn from the facts, would have warranted a contrary conclusion, and that a verdict of the jury the other way would have been set aside as against evidence."

[16] Spragins v. White (1891) 108 N. C. 449, 13 S. E. 171: A. against X. to recover the value of goods sold. X. testified that, at time of purchase, he agreed to buy upon A.'s express promise to deliver them in two weeks. A. denied this promise. The judge instructed the jury as follows: "But, if you should believe that this agreement and bargain were made, then you must inquire and determine what was meant and understood by it by the parties making it,"—which was held incorrect, it being the duty of the court to construe the contract. The court say on appeal: "But where the court presents to the jury a particular view of the facts, and this embodies the terms of the contract, which are in themselves precise and explicit, the court should declare their legal effect, and it would be error to leave this to be determined by the jury. In such a case the rule is the same as if the contract were in writing."

CHAPTER IV.

BURDEN OF PROOF.

30–31. Burden of Proof and Burden of Proceeding.
32. Burden of Proof Never Shifts.
33. Negative Allegations and Burden of Proof.
34. Verdict in Accordance with Burden of Proof.
35. Burden of Proceeding may Shift.

BURDEN OF PROOF AND BURDEN OF PROCEEDING.

30. The expression "burden of proof" has been used in a double sense:

(a) As meaning the duty of the person alleging the case to prove it.

(b) As meaning the duty of the one party or the other to introduce evidence.

31. The first is the proper meaning of the term, and in fact is implied from the words themselves.

The theory of burden of proof finds its application in the trial of every case; yet it is a simple principle and one easily understood. It relates to our way of trying a case, and has become from long usage so thoroughly a part of our system that it seems the only reasonable and natural method. The burden of proving a case (using the word "case" in its broad significance, as a basis of recovery or ground of defense) is naturally upon the person who puts it forward. The burden of proof in any action is fixed by the pleadings upon the shoulders of the one party or the other.[1] If the pleadings consist of the allegation of certain facts by the plaintiff, and their

[1] Farmers' Loan & Trust Co. v. Siefke, 144 N. Y. 354, 359, 39 N. E. 358, 359; Heinemann v. Heard, 62 N. Y. 448, per Church, C. J., at page 455; Phipps v. Mahon, 141 Mass. 471, 473, 5 N. E. 835, 836; In re Ehle's Estate, 73 Wis. 445, 458, 41 N. W. 627, 631; Huston v. Harrison, 168 Pa. 136, 150, 31 Atl. 987, 994; Eastman v. Gould, 63 N. H. 89; Osgood v. Groseclose, 159 Ill. 511, 42 N. E. 886; Chicago & A. Ry. Co. v. Jennings, 114 Ill. App. 622.

That the rule with respect to burden of proof is the same in equity as at law, see Pusey v. Wright, 31 Pa. 387, 394.

denial by the defendant, the burden of proving the facts, be they negative or affirmative, is upon the plaintiff.[2] In order to recover, he must prove his case. If the plaintiff alleges certain facts, and the defendant admits those facts, but alleges other facts, which he claims to be a defense, the burden of proof is on the defendant.[3] It is not upon the plaintiff, because it is not necessary for him to prove his case, on account of the admission of all the facts. An admission upon the trial

[2] In Phipps v. Mahon, 141 Mass. 471, 5 N. E. 835, there is an illustration of how the burden of proof may carry with it the task of supporting a negative proposition. A. sued X. on an account for $100, a balance of a sum of $200, alleged to be the reasonable value of his services as an architect. The defendant relied upon a special agreement to do the work for $100, which sum had been paid, and offered evidence of such agreement. It was held that the burden of proof fixed by the pleadings upon A. involved his establishing by a preponderance of evidence that no such special agreement existed. Starratt v. Mullen, 148 Mass. 570, 20 N. E. 178, 2 L. R. A. 697, follows the same principle. Pusey v. Wright, 31 Pa. 387; Eastman v. Gould, 63 N. H. 89, accord; Pendleton v. Cline, 85 Cal. 142, 24 Pac. 659, contra. The action for malicious prosecution furnishes another example of a plaintiff being required, by the burden of proof which rests upon him, to support a negative proposition. He must prove by a preponderance of evidence that the prosecution was without probable cause. King v. Colvin, 11 R. I. 582; Ames v. Snider, 69 Ill. 376. See, also, Com. v. Locke, 114 Mass. 288, 294; Lenig v. Eisenhart, 127 Pa. 59, 17 Atl. 684; Boulden v. McIntire, 119 Ind. 574, 581, 582, 21 N. E. 445, 448, 12 Am. St. Rep. 453; Weaver v. State, 89 Ga. 639, 15 S. E. 840; Kerr v. Freeman, 33 Miss. 292; Veiths v. Hagge, 8 Iowa, 163, 192. In Colorado Coal & Iron Co. v. U. S., 123 U. S. 307, 8 Sup. Ct. 131, 31 L. Ed. 182, Mr. Justice Matthews (pages 317–320, 123 U. S., and pages 135–137, 8 Sup. Ct., 31 L. Ed. 182) discusses at some length the proof of negative propositions.

[3] An example of the fixing of the burden of proof upon the defendant by the pleadings is found in a case where the defense of payment is set up to an action on a promissory note. Here the defendant admits what the plaintiff would have to prove to make out a prima facie case, and alleges affirmatively a fact which will relieve him from liability; the issue is therefore raised upon defendant's affirmative allegation, and upon him rests the burden of proof. Kendall v. Brownson, 47 N. H. 186; Swift & Co. v. Mutter, 115 Ill. App. 374. Adverse possession by defendant alleged as a defense in ejectment is another illustration of this. Fuller v. Worth, 91 Wis. 406, 64 N. W. 995. Suicide alleged as a defense to an insurance policy. Home Ben. Ass'n v. Sargent, 142 U. S. 691, 12 Sup. Ct. 332, 35 L. Ed. 1160; Stokes v. Stokes, 155 N. Y. 581, 50 N. E. 342.

does not affect the burden of proof. To relieve the plaintiff it must be a formal admission in the defendant's pleading of the facts which constitute the plaintiff's case.[4]

The defendant, if he sets up in his answer other facts which he claims to be a defense, is then the one who has alleged the facts which are in issue, and he must prove them.

BURDEN OF PROOF NEVER SHIFTS.

32. The burden of proof never changes. It remains to the end of the case with the party who has it at the outset.

After all the evidence is in, whether introduced by the plaintiff or by the defendant, it must appear that the person who had the burden of proof has a preponderance of the evidence in his favor, if he would win his case.[5] The burden of proof

[4] Lake Ontario Nat. Bank v. Judson, 122 N. Y. 278, 25 N. E. 367.

[5] Farmers' Loan & Trust Co. v. Siefke, 144 N. Y. 354, 39 N. E. 358; Scott v. Wood, 81 Cal. 398, 401, 22 Pac. 871, 872; Stokes v. Stokes, 155 N. Y. 581, 50 N. E. 342.

Abrath v. Northeastern Ry. Co. (1883) 11 Q. B. Div. 79: In an action for malicious prosecution by A. against X., the judge instructed the jury: "First. Did the defendants take reasonable care to inform themselves of the true state of the case? Secondly. Did they honestly believe the case which they laid before the magistrate? If both questions are answered in the affirmative, * * * that is a verdict for the defendants, because, please bear in mind that it is for the plaintiff to prove that they did not. * * * It lies on the plaintiff to prove that the railway company did not take reasonable care to inform themselves. The meaning of this is that if you are not satisfied whether they did or did not, inasmuch as the plaintiff is bound to satisfy you that they did not, the railway company would be entitled to your verdict on that point." Brett, M. R., says: "But, then, it is contended (I think fallaciously) that if the plaintiff has given prima facie evidence which, unless it be answered, will entitle him to have the case decided in his favor, the burden of proof is shifted onto the defendant as to the decision of the question itself. * * * I cannot assent to it. It seems to me that the propositions ought to be stated thus: The plaintiff may give prima facie evidence, which, unless it be answered either by contradictory evidence or by the evidence of additional facts, ought to lead the jury to find the question in his favor. The defendant may give evidence either by contradicting the plaintiff's evidence or by proving other facts. The jury have to consider, upon the evidence given upon both sides, whether they

fixes upon the party who has the duty of first going forward with the case. If he fails to introduce any evidence at all, or if he fails to introduce sufficient evidence to justify a submission of the case to the jury, the case, without any evidence being introduced by the other party, must go against him.[6] If he introduces enough evidence to justify a submission of the case to the jury, the case may still be, as it were, hanging in the balance. The jury may or may not find from the evidence introduced that he has proved his case.[7] If, however, he has introduced sufficient evidence to make out what is known as a "prima facie case," then, in the absence of evidence to controvert such case, the jury would be bound to find —for the judge would so instruct them—in his favor.

Right here we run up against that other sort of burden of proof noticed above, which is not really burden of proof at all, but only the use of that term to express something very different. When the plaintiff has introduced enough evidence to make out a prima facie case, the defendant, unless he would

are satisfied in favor of the plaintiff with respect to the question which he calls upon them to answer. If they are, they must find for the plaintiff; but if, upon a consideration of the facts, they come clearly to the opinion that the question ought to be answered against the plaintiff, they must find for the defendant. Then comes the difficulty: Suppose that the jury, after considering the evidence, are left in real doubt as to which way they are to answer the question put to them on behalf of the plaintiff; in that case, also, the burden lies on the plaintiff. And if the defendant has been able by the additional facts which he has adduced to bring the minds of the whole jury to a real state of doubt, the plaintiff has failed to satisfy the burden of proof which was upon him."

[6] In Kentucky the Civil Code of Practice (section 526) provides, "The burden of proof in the whole action lies on the party who would be defeated if no evidence were given on either side." This recognizes the true meaning of the term. See Royal Ins. Co. v. Schwing, 87 Ky. 410, 415, 9 S. W. 242, 244; Crabtree v. Atchison, 93 Ky. 338, 20 S. W. 260; Veiths v. Hagge, 8 Iowa, 163, 192; Lehman v. McQueen, 65 Ala. 570; St. Louis, I. M. & S. Ry. Co. v. Taylor, 57 Ark. 136, 20 S. W. 1083. The right to open and close which follows the burden of proof may be determined by a similar test. Lake Ontario Nat. Bank v. Judson, 122 N. Y. 278, 284, 25 N. E. 367, 369.

[7] Quock Ting v. U. S., 140 U. S. 417, 11 Sup. Ct. 733, 851, 35 L. Ed. 599, to the effect that the jury need not necessarily find in accordance with uncontradicted evidence; they may disbelieve it.

see the verdict for the plaintiff, must take up the case, and introduce evidence to controvert or weaken the effect of that which the plaintiff has introduced. This is the burden of going forward with the evidence, or the "burden of proceeding," as it may be called to distinguish it from the "burden of proof." [8] The defendant may, in his turn, introduce such evidence as will make it, in the absence of further evidence on the part of the plaintiff, clear that the facts are in his favor; the verdict, if the evidence stopped at this point, would be for him, and the burden of proceeding is shifted again to the plaintiff. Thus, in the course of a trial upon the various facts in issue, the burden of proceeding may shift from one party to the other.[9] The burden of proof, however, remains upon the shoulders of the party who had it at the outset, and is unaffected by the evidence as the trial proceeds.[10] Suppose A.,

[8] Scott v. Wood, 81 Cal. 398, 22 Pac. 871. In the case of Abrath v. Northeastern Ry. Co., supra, Bowen, L. J., discusses the question on the theory that burden of proof means burden of going forward with the evidence. He says: "The question of onus of proof is only a rule for deciding on whom the obligation of going further, if he wishes to win, rests." This is an example of the very frequent misuse of the expression.

[9] State ex rel. Leonard v. Rosenthal, 123 Wis. 442, 102 N. W. 49.

[10] The language of Andrews, C. J., in Farmers' Loan & Trust Co. v. Siefke, 144 N. Y. 354, 359, 39 N. E. 358, 359, is as follows: "There is confusion sometimes in treating of the burden of proof, arising out of unexact definitions. The burden is upon a plaintiff to establish his cause of action when it is, in proper form, denied by the other party. In actions on a promissory note this burden is, in the first instance, discharged by giving evidence tending to show that the note was signed by the defendant. Proof of signing also identifies and proves the seal, when the action is upon a sealed instrument. This prima facie establishes the cause of action. But a defendant is not concluded. He may give evidence, under a general denial, to show that the signature is a forgery, or that the note had been materially altered by the plaintiff without his consent, or many other things which might be mentioned, showing that the plaintiff never had a cause of action. It is very common to say in such cases that the burden is upon the defendant to establish the fact relied upon. All that this can properly mean is that when the plaintiff has established a prima facie case the defendant is bound to controvert it by evidence, otherwise he will be cast in judgment. When such evidence is given, and the case, upon the whole evidence,—that for and that against the fact asserted by the plaintiff,—is submitted to court or jury, then the ques-

a second mortgagee, brings an action against X., the first mortgagee, to redeem the premises. X. denies the execution and delivery of the second mortgage to A. A. puts in evidence the mortgage, which contains the usual attestation clause, and proves its execution. The burden of proof as to execution and delivery before the introduction of any evidence was upon the plaintiff, and the proof above mentioned does not shift it. The burden of proceeding, however, is shifted.

It has been held that in certain cases, where the proof of a fact lies particularly within the knowledge of the adverse party, there such party has the burden of disproving the fact alleged.[11] Is not the true explanation this: Where it appears in evidence from the pleadings, on the trial of a case, that a certain fact alleged by the plaintiff is peculiarly within the knowledge of the defendant, the failure of the defendant to give such knowledge to the jury, when, were the fact in his favor, he would naturally do so, is a sufficient circumstance to justify the jury in inferring that the fact is in truth against him.[12] The burden of proof is not shifted, but only the bur-

tion of the burden of proof as to any fact, in its proper sense, arises, and rests upon the party upon whom it was at the outset, and is not shifted by the course of the trial. * * *" See, also, Heinemann v. Heard, 62 N. Y. 448, 455; Eastman v. Gould, 63 N. H. 89; Marshall Livery Co. v. McKelvy, 55 Mo. App. 240; State v. Crawford, 11 Kan. 34; Appeal of O'Brien, 100 Me. 156, 60 Atl. 880. Where, in a criminal case, the defense is an alibi, the burden of proof is not on the defense to prove that the accused was not present at the time of the commission of the crime, but is on the prosecution to prove, beyond a reasonable doubt, when the evidence is all in, that the accused was present. Com. v. Choate, 105 Mass. 451, 459; Briceland v. Com., 74 Pa. 463, 470. The fact that a third party intervenes has no effect on the burden of proof as fixed by the pleadings. Eastmore v. Brinkley, 113 Ga. 637, 39 S. E. 105.

[11] Robinson v. Robinson, 51 Ill. App. 317; Williams v. People, 121 Ill. 84, 11 N. E. 881; Ford v. Simmons, 13 La. Ann. 397; Northwestern Mut. Life Ins. Co. v. Calloway (Ky.) 38 S. W. 430; Cook v. Guirkin, 119 N. C. 13, 25 S. E. 715; Texas Midland R. Co. v. Jumper, 24 Tex. Civ. App. 671, 60 S. W. 797.

[12] Bowen, L. J., in Abrath v. N. E. Ry. Co. 11 Q. B. D. 440, 457, says: "It has been said that an exception exists in those cases where the facts lie peculiarly within the knowledge of the opposite party. The counsel for the plaintiff have not gone the length of contending that in all those cases the onus shifts, and that the person within

den of proceeding. Chief Justice Shaw gives a very clear statement of the true nature of the burden of proof, as follows: "It may be useful to say a word upon the subject of the burden of proof. It was stated here that the plaintiff had made out a prima facie case, and therefore the burden of proof was shifted and placed upon the defendant. In a certain sense this is true. Where the party having the burden of proof establishes a prima facie case, and no proof to the contrary is offered, he will prevail. Therefore, the other party, if he would avoid the effect of such prima facie case, must produce evidence of equal or greater weight to control it, or he will fail. Still, the proof upon both sides applies to the affirmative or negative of one and the same issue or proposition of fact; and the party whose case requires the proof of that fact has all along the burden of proof. It does not shift, though the weight in either scale may at times preponderate. But when the party having the burden of proof gives competent and prima facie evidence of a fact, and the adverse party, instead of producing proof which would go to negative the same proposition of fact, proposes to show another and a distinct proposition, which avoids the effect of it, there the burden of proof shifts, and rests upon the party proposing to show the latter fact." [13]

It is quite evident that even here the learned Chief Justice uses the term "shifts" in a confusing sense. If the "other and distinct proposition" is a part of an affirmative defense, then the burden of proof does not shift, but was in the beginning, as to this affirmative defense, upon the defendant, and naturally, when the defendant takes up the question, he must assume the burden.

In criminal cases the rule with respect to the burden of proof is the same as in civil. The burden rests upon the prosecution, and remains there throughout the case.[14] No matter how strong the evidence, there is no point reached where the bur-

whose knowledge the truth peculiarly lies is bound to prove or disprove the matter in dispute. I think a proposition of that kind cannot be maintained. * * *"

[13] Powers v. Russell (1832) 13 Pick. (Mass.) 69, 76, 77; Laubheimer v. Naill, 88 Md. 174, 40 Atl. 888.

[14] People v. Garbutt, 17 Mich. 9, 97 Am. Dec. 162, furnishes a strong illustration of this. The question was as to where the burden of proof rested, upon a defense of insanity being set up to a charge of murder.

den changes; and, at the end of the case, the jury must still ask, "Has the prosecution established its case?" and not, "Has the defense proved its defense?" In the following illustration the strictness of this doctrine will be seen: On the trial of X. for murder, it is proved by indisputable circumstantial evidence that A. was shot by X. at the dead of night, in the rear of X.'s house; that A. was a friend of X.; and there had been no trouble between them; that X. said, after the shooting, "I have shot my best friend." Although no evidence is introduced by X. to justify his act, the burden of proof still remains with the prosecution.[15]

NEGATIVE ALLEGATIONS AND BURDEN OF PROOF.

33. Negative allegations have no effect upon the burden of proof.

The cases are somewhat confusing upon the subject of negative allegations and the application of the principles of

It was held that sanity was a part of the people's case, and while it was not necessary, in the first instance, to go into the question, yet, if controverted by defendant, the burden rested upon the prosecution to establish it. See opinion of Cooley, C. J., pages 21–23. See, also, Fife v. Com., 29 Pa. 429; Horn v. State, 80 Tex. App. 541, 17 S. W. 1094; State v. Crawford, 11 Kan. 34, 45.

[15] People v. Downs (1890) 123 N. Y. 558, 25 N. E. 988. The judge at the trial charged: "Now, it is for you to say to which one of these classes of crime this evidence points. There has been a homicide; there has been a human life taken. It becomes a serious question as to whether or not a man shall execute the law or execute vengeance upon his fellow. If he does, he must do it at the peril of either being punished for it, or being able to excuse himself, when called upon to answer to the wrong, within one of the excuses that is fixed and given in the law. If he is not, he must be found guilty of one or the other of the crimes which are imputed to him by reason of the homicide." This charge was clearly erroneous, as the opinion of Judge Finch on appeal points out: "While there is no legal implication of the crime of murder from the bare fact of a homicide, the jury may infer it as a fact, and may do so even though no motive is assigned for the act, and the case is bare of circumstances for explanation. People v. Conroy, 97 N. Y. 77. But the inference is one of fact, which the jury must draw, if such seems to them to be their duty, and not one of law, which the court may impose upon their deliberation, and then, upon that assumption, shift the burden upon the prisoner, and require him to prove that no crime has in fact been committed."

burden of proof thereto. One distinction which is often lost sight of will help to reconcile many seemingly conflicting decisions. There are two sorts of negative propositions: (1) Those which are a necessary part of the case sought to be established, and which must be specially alleged in the pleading. (2) Those which are merely implied from the allegation of affirmative facts, since the existence of such affirmative facts preclude the negative thereof.

The case of malicious prosecution, perhaps, affords the best example of a negative proposition of the first class. In such case it is necessary for the plaintiff to allege that the prosecution was without reasonable and probable cause. This is an essential element in his case, and he must establish this negative fact by a preponderance of evidence in order to recover. As to this fact, therefore, the burden of proof is with the plaintiff at the start, and remains with him throughout the trial. That it is a negative fact has no bearing in the case and does not affect the burden of proof.[16]

As to the burden of proceeding,—i. e., of introducing evidence—that at the start is also with the plaintiff. He must make a prima facie case on his negative proposition before the defendant need go forward with any evidence.

Of the second class of negative propositions, perhaps as good an illustration as any is found in a case where the plain-

[16] Abrath v. Northeastern Railway Co., 11 Q. B. D. 440, 457. The following from the opinion of Bowen, L. J., is as clear a statement on this subject as will be found: "Now, in an action for malicious prosecution, the plaintiff has the burden throughout of establishing that the circumstances of the prosecution were such that a judge can see no reasonable or probable cause for instituting it. In one sense that is the assertion of a negative, and we have been pressed with the proposition that, when a negative is to be made out, the onus of proof shifts. That is not so. If the assertion of a negative is an essential part of the plaintiff's case, the proof of the assertion still rests upon the plaintiff. The terms "negative" and "affirmative" are, after all, relative, and not absolute. In dealing with a question of negligence, that term may be considered either as negative or affirmative, according to the definition adopted in measuring the duty which is neglected. Wherever a person asserts affirmatively as part of his case that a certain state of facts is present or absent, or that a particular thing is insufficient for a particular purpose, that is an averment which he is bound to prove positively."

tiff seeks to recover upon an express contract. In his complaint he sets forth the contract, and the burden of proof is upon him to establish its existence by a preponderance of evidence. The affirmative allegation of the contract relied upon implies the negative allegation that the contract was not something different from that alleged. If, therefore, the defendant alleges as a defense that there was a special contract under the terms of which there is no liability, while the burden of proceeding,—i. e., of introducing evidence as to such special contract—is upon him, the burden of proof still remains with the plaintiff. He must satisfy the jury by a preponderance of evidence that no such special agreement was made.[17]

It will be found that most cases which are cited to support the proposition that the burden of proof shifts, because of a negative allegation, to the shoulders of the other party, who must establish the affirmative, are cases where what is really being talked of is burden of proceeding.[18]

VERDICT IN ACCORDANCE WITH BURDEN OF PROOF.

34. Where the evidence introduced is evenly balanced, the verdict must be against the party upon whom the burden of proof lies.

The burden of proof thus, as it always starts a case, may also end it. If the evidence is evenly balanced, the case is in exactly the position at the conclusion as it was at the beginning, and it must go against the party who has the burden of

[17] For instances illustrative of the principles above set forth, see cases cited under note 2.

[18] In California it has been attempted to take care of the subject by a statute, and there is a provision (section 1869, Code Civ. Proc.) as follows: "Each party must prove his own affirmative allegations. Evidence need not be given in support of a negative allegation, except when such negative allegation is an essential part of the statement of the right or title on which the cause of action or defense is founded nor even in such case when the allegation is a denial of the existence of a document, the custody of which belongs to the opposite party." For illustrations of the manner in which this section has been applied, see Petaluma Paving Co. v. Singley, 136 Cal. 616, 69 Pac. 426; Dirks v. California Safe Dep. & Trust Co., 136 Cal. 84, 68 Pac. 487.

proof.[19] A. sues X. for the value of services rendered by him as an election agent. A. proves the services. X. alleges, and introduces evidence to show, that the services were to be gratuitous, and the jury is in doubt as to the fact. Verdict must be for X. Parke, B., says in a leading case:[20] "The burden of proof was never altered. The plaintiff, being a professional man and performing professional services, was prima facie entitled to remuneration. Then came the evidence for the defendant to show that the agreement was that the plaintiff should not be paid. After this was given, the question for the jury still remained whether, on the whole evidence, the plaintiff had made out his title to remuneration. I think, if I had been a juryman, that, upon the facts in the case, I should have found my verdict against the party, whether the plaintiff or the defendant, on whom I was told by the judge that the burden of proof lay."

BURDEN OF PROCEEDING MAY SHIFT.

35. A prima facie case has no effect on the burden of proof, though it shifts, from the shoulders of him who has made it, the burden of proceeding.

This is in accordance with the principles already laid down as applicable to burden of proof, and emphasizes the distinction between burden of proof and burden of proceeding. The making of a prima facie case by the party on whom the burden of proof rests merely satisfies the burden of proof for the time being, and until the other party introduces some evidence to meet such prima facie case. A party, unless he has the burden of proof, is never obliged to make a prima facie case. He will win if he introduces sufficient evidence merely to meet the prima facie case made against him, and leave the question in doubt. Crowninshield v. Crowninshield[21] shows the distinction between prima facie case and burden of proof. A. offered for probate a will. X. alleges that the testator was

[19] Louisville & N. R. Co. v. Binion, 98 Ala. 570, 574, 14 South. 619, 620; Chicago Transit Co. v. Campbell, 110 Ill. App. 366.

[20] Hingeston v. Kelly (1849) 18 Law J. Exch. 360.

[21] 2 Gray (Mass.) 524 (1854).

of unsound mind. A. proves the execution of the will, by the testimony of the subscribing witness, and rests. Upon whom is the burden of proof? Thomas, J., says: "Nor, though the concurring testimony of the subscribing witnesses may make a prima facie case, is there any shifting of the burden of proof? The burden of proof does not shift when a prima facie case is made out. Nor does the existence of a general presumption that men are sane change the burden of proof. It may stand instead of proof. It may make a prima facie case. Where the question of sanity is made, it may render necessary greater weight of evidence in him who seeks to impeach it. But it does not change the burden of proof; but, where the evidence is in on the one side, on the other the issue still continues as before, and he to whose case the proof of such sanity is necessary has the burden." [22]

[22] See Baxter v. Abbott, 7 Gray (Mass.) 71, to effect that presumption of sanity is applicable to wills as well as contracts. In Barry v. Butlin (1838) 2 Moore, P. C. 480, A. offers for probate a will which he himself prepared for the testator, and under which he takes a third of the whole estate, though no relative of the testator. X. objects to the probate, on the ground that the execution of the will was procured by the fraud of A., at a time when the testator was incapacitated to make a will. The burden of proof here, as to the validity of the will, lies upon the one offering it, and there is no presumption against its validity from the fact that A. prepared the will, nor is the burden of proof shifted by that fact. Baron Parke says: "The onus probandi lies in every case upon the person propounding the will; and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator. * * * The strict meaning of the term 'onus probandi' is that, if no evidence is given by the party on whom the burden is cast, the issue must be found against him. [See Thayer's comment on this, in 4 Harv. Law Rev. 53, 54.— Ed.] * * * All that can be truly said is that if a person, whether attorney or not prepares a will with a legacy to himself, it is, at most, a suspicious circumstance of more or less weight, according to the facts of each particular case." See Paske v. Ollat, 2 Phillim. Ecc. 323; Ingram v. Wyatt, 1 Hagg. Ecc. 388; and Billinghurst v. Vickers, 1 Phillim. Ecc. 187—to the effect that, where the party benefited prepares the will, "the presumption and onus probandi is against the instrument, and the proof must go not merely to the act of signing, but to the knowledge of the contents of the paper." And from this doctrine Baron Parke dissents. This furnishes a good illustration of an incipient presumption or rule of law, which, if followed up by other decisions on the same line, might have become a full-fledged presumption.

CHAPTER V.

PRESUMPTI

36. In General.
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63. Conflicting Presumptions.

IN GENERA

36. The word "presumption," in its to describe either an inferen

No term has been more frequently We read of presumptions of law, mixed presumptions, accumulative, conflicting, strong, and weak presum ject seems an entanglement of definit leaves the mind in a hopeless state

[1] For a recent case in which the w

are a lot of things bearing certain analogies and relations to one another, to describe which the word "presumption" has been seized upon, without reflection as to its meaning, and really, perhaps, for lack of a better term.

nference.

Where the word is used synonymously with "inference," it eserves no especial consideration, except to guard against any isconception which may arise from the use of the word in so any other senses.[2]

ule of Law.

Where the word does not mean inference, it is used to deribe some "rule of law." This is the shortest way of saying at it may mean a great many different things, for the rules law are many and various. As a matter of fact, it sometimes signates a rule of substantive law, and sometimes a rule of ocedure, or other branch of the adjective law.[3]

rigin of Rules.

These rules, it is likely, all had their beginnings in logical erence, however independent of it they may have become in ir final shape. Now, the basis of inference is experience. e judge and the jury go into court with the experience of linary human beings, and, in the process of drawing infer-es, constantly call upon such experience. Coupled with the ts introduced as evidence at the trial, it forms the basis of inferences necessary to arrive at a determination of the facts

confusion produced thereby, see Reedy v. Millizen, 155 Ill. 636, N. E. 1028.

The "presumption from failure to call a witness" often spoken of, n instance of this sort; what is meant is inference. Graves v. ., 150 U. S. 118, 14 Sup. Ct. 40, 37 L. Ed. 1021; Cross v. Bell, 34 I. 82, 88. In Rice v. Com., 102 Pa. 408, the term "inference" is properly used instead of "presumption." In State v. Mecum, owa, 433, 64 N. W. 286, the term "presumption" is used indisinately for "inference." See, also, Leach v. Hall, 95 Iowa, 611, N. W. 790. See Ulrich v. Ulrich, 136 N. Y. 120, 32 N. E. 606, R. A. 37, for a criticism on the misuse of the term in a charge e jury.

When the word "presumption" is used, it will clear the mind to k: (1) Is the word used for "inference"? If not, (2) what rule w does it refer to? One may thus get rid of carrying in the l the subject of presumptions as a separate branch of the law.

in issue. It happens that, in the almost innumerable cases that are tried, certain facts or groups of facts have been repeatedly presented to courts as foundations for inferences; and the inferences being reasonable ones, judged by the experience of the court and jury, have been repeatedly drawn until a rule has crystallized. It is not difficult to see why these rules developed so early, and were so readily adopted by the courts. Judges have always been suspicious of juries, and have seized every opportunity to establish rules for their guidance, and to control their conclusions from the evidence introduced. The mind of the judge was supposedly nothing if not logical, while the untrained minds of the jury were open to the influences of prejudice, sympathy, and a thousand other things. Logical inference was therefore made the basis of a vast number of such rules which the judges established, and which they called "presumptions,"—rules relating to the manner of proving cases, and in this sense having to do with the law of evidence; fixing, for example, when sufficient evidence was introduced, or when a party must introduce further evidence if he would win his case.[4]

PRESUMPTIONS AS INFERENCES.

37. There are no special rules which govern the subject of logical inferences, and presumptions which are merely inferences relate to all classes of things and cases.

Inasmuch as the term "presumption" is used to describe a rule of law, it is rather unfortunate that it has been so generally used by the courts as a substitute for the word "inference." It is not necessary, however, to quarrel with the use of the

[4] As to the effect of a presumption, Prof. Thayer says: "They have the same effect (and no other) which they have in all the other regions of legal reasoning. Their effect results, necessarily, from their characteristic quality. This quality imputes to certain facts, or groups of facts, a certain prima facie significance or operation. In the conduct, then, of an argument or of evidence, they throw upon him against whom they operate the duty of meeting this imputation. Should nothing further be adduced, they settle the question involved in them in a certain way. He, therefore, who would not have it settled so, must show cause." Thayer, Cas. Ev. (2d Ed.) p. 41.

word in the latter sense, if the fact of its double meaning be kept constantly in mind when the subject is under discussion. It will be at once recognized that in the following cases, which are illustrations of the innumerable cases of this character, the word was synonymous with inference, viz.: Where, in an action for death caused by an explosion of molten metal, the court say they cannot "presume that there was molten metal under the slag in a kettle, and that the slag had formed a crust which held the metal underneath," etc.[5] Where it is said, in an action for libel for injuries caused to a stevedore: "The plaintiff is not bound to prove more than enough to raise a fair presumption of negligence on the part of the defendant and of resulting injury to himself. Having done this, he is entitled to recover, unless the defendant produces evidence sufficient to rebut this presumption. Though it is not every accident that will warrant an inference of negligence, yet," etc.[6] Where the court, in discussing the facts of a negligence case, say: "If the jury were to presume that the engineer saw Tull when he blew the whistle, they would have to further presume that he could have stopped the train in time to have avoided striking him. This would be building one presumption on another, which is not permissible." [7]

The cases which are so often cited as illustrating the proposition that there is a presumption against the party who suppresses or destroys evidence, or fails to call a witness within his control, are all cases where what is talked of is inference.[8]

[5] Bycyznski v. Illinois Steel Co., 115 Ill. App. 326.

[6] The Joseph B. Thomas (D. C.) 81 Fed. 578.

[7] Tull v. St. L. S. W. Ry. Co. (Tex. Civ. App.) 87 S. W. 910.

[8] Carpenter v. Penn. Ry. Co., 13 App. Div. 328, 43 N. Y. Supp. 203. Where the witness is equally available to either party, no inference can be claimed in favor of the one party against the other by reason of failure to call him. Daggett v. Champlain Mfg. Co., 72 Vt. 1081, 47 A. 1081.

In the case of Harriman v. Reading & Lowell Street Railway Co., 173 Mass. 28, 53 N. E. 156, the court adhere to the use of the word "inference" for this sort of thing. See, also, Sullivan v. Sullivan, 188 Mass. 380, 74 N. E. 608.

In one case it has been said that the presumption from failure to call an important witness is a conclusive presumption. Garber v. Blatchley, 51 W. Va. 147, 41 S. E. 222. But this is carrying the doctrine to an extreme not warranted by the authorities.

That there is no presumption in the sense of a rule of law has at times been clearly recognized.[9]

PRESUMPTIONS AS RULES OF LAW.

38. The rules of law called "presumptions" comprise two classes:

(a) Those which are indirectly connected with the law of evidence, through having to do with its effect, and to which the term "presumption" properly belongs.

(b) Those which have nothing to do with evidence, and which may be designated as spurious presumptions.

39. The first class, presumptions proper, while indirectly connected with the law of evidence, are not a part of it. They have to do only with its effect and not with its admissibility. They determine the sufficiency of evidence either;

(a) To shift the burden of proceeding, or

(b) To establish an absolute case.

Process of Development.

Rules of law of this sort were undoubtedly developments. They were not always rules. The first stage was that of a mere inference, permissible to judge or jury; the second was a mere disposition on the part of the judge to advise the jury as to the desirability of such an inference; the third, an instruction that such an inference ought to be drawn; and the fourth, a rule that the inference was a necessary one, which the jury were bound to draw.[10] Take the case of the seven years' ab-

[9] Kirkpatrick v. Allemania Fire Ins. Co., 102 App. Div. 327, 329, 92 N. Y. Supp. 466. Here the court say: "While no presumption arises from the failure to call a witness, I understand that a jury may draw such inferences as they think warranted by the evidence from the failure of either party to call any witness who might reasonably be expected to shed light on the transaction."

[10] The same result, only accomplished by the quicker method of legislative enactment, is found in the statute of 2 Jac. I. (1604) c. 8, par. 2, referred to in Lord Morely's Case (1666) J. Kelyng, 53, which was to the effect that one who stabs another "that hath not then any weapon drawn, or that hath not then first stricken the party which shall first stab or thrust, * * * although it cannot be proved that the same was done of malice aforethought, yet the party so offending * * * shall * * * suffer death as in case of will-

sence rule. The fact that a person is not heard from for a space of seven years by those who would be likely to hear from him if alive is a fact from which the inference may be reasonably drawn that he is dead. An absence of six years under the same circumstances would not be quite so strong, but an absence of eight years would be stronger. The space of seven years, however, became fixed in the law as the least period from which death might be inferred. Having once fixed the period from which the inference was permissible, the judges were not long in instructing the jury that the inference ought to be drawn, and finally taking it out of the jury's hands entirely, and establishing the rule that it must be drawn.

SAME—RULES OF EQUIVALENTS.

40. In their final shape, these rules become rules of equivalents, either prima facie or absolute.

Prima Facie Equivalents or Presumptions.

Taking the seven years' absence rule above referred to as an example, it is to be observed that when a rule of this sort takes its final shape, strictly speaking, it no longer has anything to do with logical inference; it matters not whether such inference exists. The rule has become one of equivalents; i. e., that seven years' absence, under the circumstances mentioned, is equivalent to death. In cases of this nature, however, it is only a rule of prima facie equivalents, since evidence may be introduced to show that the inference which the rule requires is not in accordance with the facts. It fixes the point at which a prima facie case is established, and hence directly affects the burden of proceeding.

The identity of a rule of this sort with what is known as a "prima facie case" will be noticed. A prima facie case is established when the party upon whom the burden of proof rests

ful murder." In Lord Morely's Case it was resolved by "all the judges of England" that this statute was only a "declaration of the common law." Here was an inference crystallized into a rule,—a rule which, if established by the courts, would have undoubtedly been named a presumption.

has introduced enough evidence to prove the facts alleged, provided no evidence is introduced on the other side. It may, in some cases, be difficult to tell just when this point is reached. The effect of the rule of law as to equivalents of facts is to fix the point, and thus help the judge in the conduct of the trial, and the parties in the conduct of the evidence. It fixes upon certain facts introduced as evidence the effect of being sufficient to shift the burden of proceeding to the other party.[11]

Conclusive Equivalents or Presumptions.

The conclusive presumption was the result of the further development of the same rule of equivalents. In the process of development, the judges in some cases went one step further, and said that fact No. 1 should be equivalent to fact No. 2, at all events, and no evidence would be permitted to show that it was not. This was going beyond the prima facie stage, and departing still further from the starting point of logical inference. It was, in fact, establishing a rule of positive law—a thing which the courts have always disclaimed, and which they therefore accomplished under the guise of the much-used and much-abused term "presumption."[12] This is what is known as a "conclusive" or "inevitable" presumption.

[11] State v. Pike, 49 N. H. 399, 442–444, 6 Am. Rep. 533. In Graves v. Colwell, 90 Ill. 612, the effect mentioned in the text is held to follow from the somewhat peculiar rule of law that where a deed is made to one of two parties of the same name, and they are father and son, the father will be taken to be intended, unless evidence is introduced to the contrary.

[12] Prof. Thayer, in an article in 3 Harv. Law Rev. 148–151, very aptly likens this to the modern theory of estoppel. He says: "In such cases the judges accomplish, through the phraseology and under the garb of evidence, the same results which they have long reached, and are now constantly reaching, by the directer means of estoppel. The modern extension of this doctrine broadens the law by a direct application of the maxims of justice—a simple method, and worthy of any judicial tribunal which rises to the level of its great office, and yet one not quite in harmony with the general attitude of our common-law courts and their humble phraseology in professing to abdicate the office of legislation. But inasmuch as every body of men that undertakes to administer the law must, in fitting it to the ever-changing combinations of fact that come before them, constantly legislate, incidentally and in a subsidiary way, it is best that this should be openly done, as it really is in the cautious extensions of the prin-

Illustration.

The best illustration of it is, perhaps, found in the rule that from 20 years of adverse possession a lost grant will be conclusively presumed. "The judges at first laid down that, if unanswered, 20 years of adverse possession justified the inference; then that it 'required the inference,'—i. e., it was the jury's duty to do what they themselves would do in settling the same question, namely, to find the fact of the lost grant; and, at last, this conclusion was laid down as a rule of the law of property, to be applied absolutely." [13] In this shape, the rule of law has the effect of fixing upon certain facts, introduced as evidence, the quality of being sufficient to establish the case absolutely.

The frequent coincidence of two facts, as evidentiary and main facts, first suggests rules of this sort. Such a rule would not be likely to develop from a mere permissible inference, unless the coincidence of the evidentiary and main facts was a common occurrence; and it is consequently only with respect to certain facts which are often in issue, and for the proof of which the same secondary facts have often been introduced, that a rule becomes established. Thus, if it had never been sought to prove death by absence for a long period of time but once, no rule would ever have existed such as the "seven-years" rule referred to.[14]

ciple of estoppel. The same thing has taken place by presumptions, only it was more disguised. By merely handling 'evidence,' and fixing upon it a given quality, the judge's denial of any right to make the law has seemed to moult no feather."

[13] Thayer, 3 Harv. Law Rev. p. 149. In Dalton v. Angus, 6 App. Cas. 740, Lord Blackburn traces the development of the rule (pages 811–814). He says: "The modern doctrine that a jury ought to be directed that, if they believed that there has been what was equivalent to adverse possession as a right for more than twenty years, they ought to presume that it originated lawfully, that is, in most cases, by a grant, must certainly have been introduced after the passing of the statute of limitations, 21 Jac. I. c. 16 (A. D. 1623); and as the earliest reported decision is that of Lewis v. Price, in 1761, referred to in Sergeant Williams' note to Yard v. Ford, 2 Saund. (Ed. 1871) 504, the doctrine is probably not much more than a century old." Smith v. Putnam, 62 N. H. 369, acc.

[14] It is this sort of a rule to which Stephen applies the term "presumption" (Steph. Dig. Ev. note 1, Append.): "I use the word 'presump-

Rules of Law Imputing a Prima Facie Effect to Facts in Particular Cases.

The general nature and effect of these rules having been explained, it remains to state a few of the more important ones. There are many of them, and the number is undoubtedly increasing from year to year, as the facts with which courts have to deal increase in volume and variety. The seven years' absence rule, which has already been explained, is, perhaps, the best example of the class of rules which operate to make a prima facie case, and thereby shift the burden of proceeding. It may be expressed as follows:

PRIMA FACIE RULES OR PRESUMPTIONS—DEATH.

41. Absence for seven years, with a total lack of communication with those who would naturally have heard from him if he was alive, is sufficient evidence of the death of the absent party.[15]

Lord Ellenborough expresses the rule as follows: "The presumption of the duration of life with respect to persons of whom no account can be given ends at the expiration of seven years from the time when they were last known to be living." [16] This is not a satisfactory statement of the rule, as it involves the use of the word "presumption" in the sense of "inference." There is no presumption of the duration of human life; there may, however, be a permissible inference. There is, however,

tion' in the sense of a presumption of law capable of being rebutted. A presumption of fact is simply an argument. A conclusive presumption I describe as conclusive proof. Hence the few presumptions of law which I have thought it necessary to notice are the only ones I have to deal with." At page 4, he defines "presumption" as follows: "A presumption means a rule of law that courts and judges shall draw a particular inference from a particular fact, or from particular evidence, unless and until the truth of such inference is disproved."

[15] Reedy v. Millizen, 155 Ill. 636, 40 N. E. 1028; Wentworth v. Wentworth, 71 Me. 72; Osborn v. Allen, 26 N. J. Law, 388, p. 390; Winship v. Conner, 42 N. H. 341. For a case where the matter is treated purely as one of logical inference from facts, see Marden v. Boston, 155 Mass. 359, 29 N. E. 588.

[16] George v. Jesson (1805) 6 East, 80, 85.

a presumption (or rule) of death under the circumstances mentioned, as has been explained.

As the presumption or rule is only a prima facie one, any evidence logically relevant to show the person was living is allowable. That the person has been heard from by any one, whether it be one who would naturally hear from him or not, is admissible.[17]

The presumption cannot be used as the basis for establishing a good title for the purpose of compelling specific performance; nor, where a title depends on the death of a party, will absence of such party for seven years in any event be sufficient proof of death. This phase of the presumption was illustrated in an interesting manner in the case of Youngs v. Heffner.[18] A. brought action against X. to have certain land partitioned, claiming a two-sevenths interest therein. X. claimed title acquired by purchase. It seemed that A., with several brothers and sisters, inherited the land. A. disappeared, and was unheard of for more than 30 years. He was supposed to be dead. Acting upon that assumption, his brothers and sisters, as his heirs, applied to have the land partitioned, and under order of the court it was sold in the partition suit to X. A. then reappeared and brought suit, claiming that he was the lawful owner of his original interest. It was held that the presumption did not help the title in the least, as it was wholly rebutted by the reappearance of A.[19]

The absence must be absence from his last place of residence "which was known to his family or his relatives who would be likely to know whether he was living, and from whom a party in the search of the truth would be likely to make inquiries. The mere fact, therefore, that the party has absented himself from the place of his birth, or from his original domicile, for more than seven years, does not raise a presumption that he is dead." [20]

[17] Flynn v. Coffee, 12 Allen (Mass.) 133; Youngs v. Heffner, 36 Ohio St. 232.

[18] 36 Ohio St. 232.

[19] See, also, Walton v. Meeks, 120 N. Y. 79, 23 N. E. 1115, where it was sought to make a similar use of the presumption.

[20] McCartee v. Camel, 1 Barb. Ch. (N. Y.) 455, per Chancellor Walworth, at page 463.

42. There is no rule as to the particular time within the period at which death will be assumed to have taken place.[21]

The meaning of this is that one who asserts a right based upon the death of a person at any particular time, whether at

[21] A. brings an action in ejectment against X. A. Claims the property as grantee of a reversion after death of M. The action was commenced January 18, 1834. X. claimed by 20 years' adverse possession. M. left his home in December, 1806, and the last heard from him was a letter which was received in May, 1807. A.'s interest vested on the death of M. How does the presumption of death in the case of one not heard of for 7 years affect the case (1) as to whether the action was begun within the 20 years' limitation; (2) as to whether X. had held 20 years' adverse possession? Lord Denman says: "It is true, the law presumes that a person shown to be alive at a given time remains alive until the contrary be shown, for which reason the onus of showing the death of M. lay in this case on the plaintiff. He has shown the death by proving the absence of M., and his not having been heard from for seven years; whence arises, at the end of those seven years, another presumption of law, namely, that he is not then alive. But the onus is also cast on the lessor of the plaintiff of showing that he has commenced his action within twenty years after his right of entry accrued; that is, after the actual death of M. Now, when nothing is heard of a person for seven years, it is obviously a matter of complete uncertainty at what point of time in those seven years he died. Of all the points of time, the last day is the most improbable and most inconsistent with the ground of presuming the fact of death. That presumption arises from the great lapse of time since the party has been heard of, because it is considered extraordinary, if he was alive, that he should not be heard of. * * * If you assume that he was alive on the last day but one of the seven years, then there is nothing extraordinary in his not having been heard of on the last day; and the previous extraordinary lapse of time, during which he was not heard of, has become immaterial, by reason of the assumption that he was living so lately. * * * We adopt the doctrine of the court of king's bench that the presumption of law relates only to the fact of death, and that the time of death, whenever it is material, must be a subject of distinct proof." Nepean v. Doe (1837) 2 Mees. & W. 894. See, also, to same effect, Doe v. Nepean, 5 Barn. & Adol. 86; Hopewell v. De Pinna, 2 Camp. 113. The following American cases support the same view: Davie v. Briggs, 97 U. S. 628, 24 L. Ed. 1086; State v. Moore, 11 Ired. (N. C.) 160, 53 Am. Dec. 401; Whiteley v. Assurance Soc., 72 Wis. 170, 39 N. W. 369; Tisdale v. Insurance Co., 26 Iowa, 170, 96 Am. Dec. 136; McCartee v. Camel, 1 Barb. Ch. (N. Y.) 455; Howard v. State, 75 Ala. 27; Hancock v. Insurance Co., 62 Mo. 26.

the beginning, at any time during, or at the expiration of the seven years' period, must prove by a preponderance of evidence that death took place at such time. The law will not help a party by presuming anything as to the time of death.

There is a line of decisions which lay down the doctrine that the presumption relates not only to the fact of death, but also to the time, and fixes that time as the expiration of the seven years. They base this doctrine upon the supposed presumption of the continuance of human life, saying that that presumption suffices to establish life until the conflicting presumption of absence for seven years begins to operate and overcomes it.[22] All this is extremely confusing and unsatisfactory.

There is no rule which requires the inference to be drawn that a person, shown to be alive at a particular time, continues to live. It may be true that the fact that one is proved to be living at one time will justify the inference that he is alive a month or a year later, but this will depend largely upon the circumstances which are proved. If life is shown, but in such a state of health that in ordinary course he could live but a few weeks, there would be no basis whatever for the inference of continuance of life. The better rule would seem to be that

[22] The case of Reedy v. Millizen, 155 Ill. 636, 40 N. E. 1028, proceeds upon the theory that the law will presume that life continues during the whole of the seven years. In the opinion of the court it is said (page 638 of 155 Ill., page 1028 of 40 N. E.), "While, therefore, it is true that there is no presumption that death occurred at any particular time within the seven years, it is also true that, in the absence of contravening facts or controlling presumptions, it will be presumed that life continued during the entire period." What the evidence disclosed was simply that the party relying upon death prior to the expiration of the seven years had failed to establish that fact, and, on the contrary, what evidence there was tended rather to justify the inference that the party was alive after the time at which that death was sought to be proved. Under these circumstances, the court might well have reached the result it did without resort to any presumption of continuance of life. See, also, Whiting v. Nicholl, 46 Ill. 230, 92 Am. Dec. 243; Clarke's Ex'rs v. Canfield, 15 N. J. Eq. 119; Eagle's Case, 3 Abb. Prac. (N. Y.) 218; Burr v. Sim, 4 Whart. (Pa.) 150, 33 Am. Dec. 50. For a full discussion of this doctrine, justifying it and criticising the English rule, see Mr. Justice Field's opinion in Montgomery v. Bevans, 1 Sawy. (U. S.) 653, 662–668, Fed. Cas. No. 9,735.

there is no presumption or rule of law which affects the question; but that each case must stand upon its own evidence, as a question of logical inference.

SAME—OWNERSHIP OF PERSONAL PROPERTY.

43. Possession of personal property when there is no evidence explaining its nature is prima facie proof of ownership. [23]

Possession is, undoubtedly, sufficient to justify an inference of ownership; and, if the drawing of the inference was entirely unfettered by any rule as to its necessity, we would have merely one of the thousands of instances of facts justifying inferences. But the courts conceived it to be proper to lay down a rule in respect to the matter, and, doing it in the language of the law of evidence, called it a "presumption." It is one of the rules of the law relating to personal property, and though born in the courts instead of the legislature, and brought up in the lap of evidence instead of its rightful parent, it cannot hide its real character.

It has been held that, in the case of growing crops and farm products, possession is not prima facie proof of ownership, if it is consistent with the ownership being in another, even though no evidence be given as to the ownership.[24]

SAME—LEGITIMACY.

44. Evidence that a child is born during wedlock is sufficient to establish its legitimacy, and shift the burden of proceeding to the party seeking to establish the contrary.

[23] Possession of a negotiable instrument, indorsed in blank, is prima facie evidence of title. Collins v. Gilbert, 94 U. S. 753, 24 L. Ed. 170; James v. Chalmers, 6 N. Y. 209; Rubey v. Culbertson, 35 Iowa, 264; Hovey v. Sebring, 24 Mich. 232, 9 Am. Rep. 122. Possession of vessel: Stacy v. Graham, 3 Duer (N. Y.) 444, 452. Possession of live stock: Vining v. Baker, 53 Me. 544; Goodwin v. Garr, 8 Cal. 615. That possession of real estate, in the absence of other evidence, is sufficient prima facie evidence of title: Perry v. Weeks, 137 Mass. 584; Ward's Heirs v. McIntosh, 12 Ohio St. 231.

[24] Rawley v. Brown, 71 N. Y. 85.

This rule was formerly stated as a conclusive presumption, —i. e., a rule of law which absolutely and finally determined the fact of legitimacy, and allowed no further question;[25] but it is now settled that it may be rebutted by any evidence which is competent,[26] and it therefore falls within the class of prima facie rules.

SAME—WIFE COMMITTING CRIME IN PRESENCE OF HUSBAND.

45. Evidence that a wife committed a crime, other than treason or homicide, in the presence of her husband, is sufficient to show that she acted under his coercion.

[25] In the case of Alein de Wartone v. Simon, the Son of Gilian (1304) Y. B. 32 & 33 Edw. I. p. 60, Hengham, C. J., cites an instance where, though the jury found that the husband went over the sea, and stayed three years, and on his return found a child born one month, and that, therefore, such child was not his daughter, yet, "nevertheless, because the private affairs of a man and his wife cannot be known—for he may have come into the country by night before, and begotten this woman upon his wife—it was awarded by the justices that she should recover."

[26] The presumption of legitimacy is said by Stephen (article 98) to be conclusive unless nonaccess is shown, or that the circumstances of the access were such as to render it highly improbable that sexual intercourse took place. Pendrell v. Pendrell (1732) 2 Strange, 925, is said to be the first case in which it was decided that the presumption could be rebutted by other proof. In Cross v. Cross (1832) 3 Paige, Ch. (N. Y.) 139, it is said (page 140, 23 Am. Dec. 778): "The ancient rule that the husband must be presumed to be the father if he was within the four seas during any part of the usual period of gestation has been long since exploded, and, as Justice Gross says, 'on account of its absolute nonsense.' But the modern rule, which is marked out by its good sense, is that, to bastardize the issue of a married woman, it must be shown beyond all reasonable doubt that there was no such access as could have enabled the husband to have been the father of the child." To the same effect is Van Aernam v. Van Aernam (1846) 1 Barb. Ch. (N. Y.) 375; Phillips v. Allen, 2 Allen (Mass.) 453; Egbert v. Greenwalt, 44 Mich. 245, 6 N. W. 654, 33 Am. Rep. 260. In the following cases: State v. Romaine, 58 Iowa, 46, 11 N. W. 721; Wright v. Hicks, 12 Ga. 155, 56 Am. Dec. 451; Hawes v. Draeger, 23 Ch. Div. 173; Herring v. Goodson, 43 Miss. 392—the language of the courts is not so strong with respect to requiring proof beyond a reasonable doubt to rebut the presumption, but tends towards the sufficiency of a preponderance of evidence.

The presumption that a wife committing a crime, other than treason or homicide, in the presence of her husband, acts under his coercion, was a rule of the criminal law. Possibly, it may have had its origin in an inference at one time rendered permissible by the state of the times and the customs of the people. It long survived, however, the existence of these conditions. It has been stated sometimes as a conclusive presumption,[27] but the well-established modern doctrine is that it may be rebutted;[28] and, if it at any time developed so far from the original starting point of inference as to have become an absolute rule, it never acquired much stability in that character, and soon dropped back into a rule with merely a prima facie effect.

An interesting phase of this presumption is found in a case where the wife is charged with the commission of the crime of perjury in giving testimony in behalf of her husband on the trial of a criminal charge against him. The question is whether, he being present in the prisoner's dock while she is testifying, it will be presumed that she acted under his coercion. The Massachusetts courts have expressed the opinion that in such case the rule that there is a presumption of coercion does not apply.[29]

What facts will constitute presence on the part of the husband has been held to be a question of fact for the jury, in all cases where the wife did not act in his direct presence, or under his eye.[30]

[27] 1 Greenl. Ev. § 28; though later in his work (volume 3, § 7) he concedes that there is a question as to whether the better view is not that it is a rebuttable presumption.

[28] People v. Ryland, 97 N. Y. 126; State v. Cleaves, 59 Me. 298, 8 Am. Rep. 422.

[29] Com. v. Moore, 162 Mass. 441, 443, 38 N. E. 1120.

[30] Com. v. Daley, 148 Mass. 11, 18 N. E. 579. On the trial of X., a married woman, for unlawfully selling intoxicating liqours, it appeared that the husband was in another room, between which and the barroom there was a closed door. It was held that it could not be said, as a matter of law, that being on the premises was sufficient "presence," but the jury were to determine the question. See, also, Seiler v. People, 77 N. Y. 411. In a case of this sort, it would seem that what the jury really determines is whether there was coercion; that is, whether there was such a presence on the part of the husband as

SAME—CAPACITY OF INFANTS TO COMMIT CRIME.

46. Evidence that an infant is between the ages of seven and fourteen is sufficient to show, prima facie, that he is incapable of committing a crime.

Prima facie, an infant between the ages of seven and fourteen is incapable of crime. This is a rule of the criminal law, which usually goes under the name of a presumption. Its effect is that, when it is shown that the person charged with the commission of a crime is under the age of fourteen, the burden is thrown on the prosecution of introducing evidence showing capacity for crime.[31] If it be assumed that the commission of the act charged has been clearly proved by the prosecution, and a prima facie case made out, the defendant need only show the fact that he was under fourteen to throw the burden of proceeding back onto the prosecution. Ordinarily, capacity to commit crime is assumed, just as sanity and many other mental and physical conditions are assumed, without requiring special proof. Let infancy under fourteen be shown, and the assumption changes from capacity to incapacity.

SAME—CONVERSION.

47. Evidence of a demand and refusal is prima facie sufficient to show a conversion.

This is a rule in the law of torts, though commonly called a presumption. Undoubtedly, it was but an inference in the be-

would exercise a controlling influence over the wife's acts. The presumption really has no influence on the result.

[31] Rex v. Owen, 4 Car. & P. 236; Reg. v. Smith, 1 Cox, Cr. Cas. 260. In the latter case, Erle, J., says: "Where a child is under the age of seven years, the law presumes him to be incapable of committing a crime. After the age of fourteen he is presumed to be responsible for his actions, as entirely as if he was forty; but between the ages of seven and fourteen no presumption of law arises at all, and that which is termed a malicious intent—a guilty knowledge that he was doing wrong—must be proved by the evidence, and cannot be presumed from the mere commission of the act."

ginning, which was permissible to the jury. Actual conversion of property, however, in many instances being a difficult thing to prove, and demand and refusal being in many cases the only evidence possible, the matter gradually took on the shape of a prima facie rule; and it was laid down that proof of demand and refusal was equivalent to proof of conversion, unless rebutted by explanatory evidence.[32]

SAME—RECEIPT OF LETTER.

48. Evidence of the mailing of a letter, properly addressed and stamped, is prima facie sufficient to prove the receipt by the addressee of such letter.

The principle above stated is perhaps well enough established at the present time to justify its being considered a prima facie rule or presumption. If so, it is an example of a comparatively recent crystallization of a rule of law from the repeated use of the same kind of proof to establish a particular fact. It is even now sometimes treated as a matter of inference only, to be left to the jury,[33] or as one of the cases where the so-called presumption of regularity applies.[34]

It seems, however, that in most states the matter is to be

[32] Caunce v. Spanton, 7 Man. & G. 903.

[33] Bloom v. Wanner (Ky.) 77 S. W. 930.

[34] See page 112. In Henderson v. Coke Co., 140 U. S. 25, 11 Sup. Ct. 691, 35 L. Ed. 332, Mr. Justice Brewer says (page 37 of 140 U. S., and page 695 of 11 Sup. Ct): "This is not a conclusive presumption, and it does not even create a legal presumption, that such letters were actually received. It is evidence tending, if credited by the jury, to show the receipt of such letters—'a fact,' says Agnew, J. (Tanner v. Hughes, 53 Pa. 290), 'in connection with other circumstances, to be referred to the jury, under appropriate instructions, as its value will depend upon all the circumstances of the particular case.' * * * This presumption, which is not a presumption of law, but one of fact, is based on the proposition that the post office is a public agency charged with the duty of transmitting letters, and on the assumption that what ordinarily results from the transmission of a letter through the post office probably resulted in the given case. It is a probability resting on the custom of business, and the presumption that the officers of the postal system discharged their duty."

regarded as fairly within the class of prima facie presumptions.[35]

In several states the action of the courts in judicially establishing this rule has been either anticipated or possibly confirmed by statutory provision.[36]

There seems to be no presumption which prevails as to the exact time of receipt, and when exact time is material it must be proved.[37]

CONCLUSIVE RULES OR PRESUMPTIONS.

49. The conclusive presumption is a rule usually dictated by some policy of the law, adopted by the courts, and carried out by them under the guise of a rule of evidence.

As has already been explained, the conclusive presumption has sometimes developed out of an oft-recurring inference,

[35] Jensen v. McCorkell, 154 Pa. 323, 26 Atl. 366, 35 Am. St. Rep. 843; Briggs v. Hervey, 130 Mass. 186; Ackley v. Welch, 85 Hun, 178, 32 N. Y. Supp. 577; Merchants' Exchange Co. v. Sanders, 74 Ark. 16, 84 S. W. 786; Dick v. Zimmerman, 207 Ill. 636, 69 N. E. 754; Veley v. Chinger, 18 Pa. Super. Ct. 125, 130; Sutton v. Corning, 59 App. Div. 539, 69 N. Y. Supp. 670; National Masonic Acc. Ass'n v. Burr, 57 Neb. 437, 77 N. W. 1098; Small v. Town of Prentice, 102 Wis. 256, 78 N. W. 415. Evidence that the person to whom the letter is addressed has no recollection of receiving the letter has been held insufficient to meet the prima facie effect of proof of mailing. Ashley Wire Co. v. Illinois Steel Co., 164 Ill. 149, 158, 45 N. E. 410, 56 Am. St. Rep. 187; Roth Clothing Co. v. Marine S. S. Co., 44 Misc. Rep. 237, 88 N. Y. Supp. 987. It is also held, carrying out the same principle, that, if an envelope contains printed directions to return in 10 days if not called for, proof that it was not called for is sufficient prima facie proof that it was duly returned. Hedden v. Roberts, 134 Mass. 38, 45 Am. Rep. 276.

The doctrine has also been extended to telegrams. Oregon S. S. Co. v. Otis, 100 N. Y. 446, 3 N. E. 485, 53 Am. Rep. 221; Perry v. German American Bank, 53 Neb. 89, 73 N. W. 538, 68 Am. St. Rep. 593; Western Twine Co. v. Wright, 11 S. D. 521, 78 N. W. 942, 44 L. R. A. 438.

[36] Hill's Ann. Laws Or. 1892, § 776, subd. 24, provides "that a letter duly directed and mailed was received in the regular course of the mail" is a presumption of law. Code Civ. Proc. Cal. 24, § 1963, subd. 24.

[37] Bishop v. Life Insurance Co., 85 Mo. App. 302, 306.

going first through the stage of a prima facie rule. More often it is purely and simply the statement of a doctrine of the positive law, which, by reason of its readily lending itself to the language of inference and evidence, on account of the facts to which it relates, is stated in the form of a rule of evidence.[38] Where it has not developed from a process of inference, it should, strictly speaking, be classed as a spurious presumption.

SAME—TITLE TO LAND BY PRESCRIPTION.

50. Uninterrupted possession of land for a certain period, usually fixed by statute, conclusively establishes title.

It was commonly said that a lost grant would be conclusively presumed. This is an instance of the absolute equivalence of facts established by a rule of law. When a certain sort of possession exists, there exists a lost grant; at least, the law so treats the case, and will not permit of evidence to the contrary. There is no presumption here; no question of inference; simply a rule of the law of real property which the courts enforce.[39]

This doctrine of lost grant has even been extended to cases where the possession did not comply strictly with the requirements of an adverse possession, but consisted only in the exercise of acts of ownership over a portion of the premises to

[38] An illustration of the manner in which the courts handled this sort of thing is found in Tooke's Case (1794) 25 How. State Tr. 1. At column 725, Lord Chief Justice Eyre says: "That it was not denied, and it was impossible that it could be denied, that the jury ought to find that he who means to depose the king compasses and imagines the death of the king. It is, indeed, a presumption of fact, arising from the circumstance of intending to depose, so undeniable and conclusive that the law has adopted it; and it is in this manner that the law has pronounced that he who means to depose the king has compassed and imagined the death of the king." Here it is a principle of the criminal law that masquerades as a rule of evidence.

[39] Bryant v. Foot (1867) L. R. 2 Q. B. 161; Brown v. Oldham, 123 Mo. 621, 27 S. W. 409; Moore v. Luce, 29 Pa. 260, 72 Am. Dec. 629. In Trustees of Wadsworthville Poor School v. Jennings, 40 S. C. 168, 18 S. E. 257, 891, 42 Am. St. Rep. 854, the presumption seems to have been held a rebuttable one.

which title was claimed;[40] but this is not the prevailing doctrine.[41] It is generally held that the presumption will not arise unless the possession satisfies all the conditions of the doctrine of adverse possession.

SAME—LEGAL ORIGIN OF CUSTOM.

51. Proof of the existence of a custom or the enjoyment of a right or easement during living memory raises a presumption of its existence from time immemorial (or back to the time of Richard I, 1189); and the existence of a custom from time immemorial raises a presumption of legal origin.[42]

[40] Fletcher v. Fuller, 120 U. S. 534, 7 Sup. Ct. 667, 30 L. Ed. 759. This case, however, only goes to the extent of holding that the jury should be permitted to presume a lost grant for the purpose of quieting title. It does not state that the jury should be instructed, as a matter of law, to so find.

[41] Corning v. Nail Factory, 34 Barb. (N. Y.) 529; De Lancey v. Piepgras, 138 N. Y. 26, 33 N. E. 822; Mission of Immaculate Virgin v. Cronin, 143 N. Y. 524, 38 N. E. 964. In the case last cited it appeared that X., claiming title by adverse possession, or by presumption of lost grant, was unable to show adverse possession, as the land had never been inclosed or actually occupied. It was claimed, however, that there was such a possession as would suffice to raise a presumption of a lost grant. Earl, J., in delivering the opinion of the court, said (page 527 of 143 N. Y., page 965 of 38 N. E.): "Here there was claim of title for many years, and acts upon the land consistent with, and indeed indicative of, ownership. But such claim and acts, in the absence of actual or constructive possession going with them and characterized by them, have never of themselves been held sufficient to authorize the presumption of a grant from the true owner. * * * If, upon such facts as exist here, a grant could be presumed, it would be easy for a claimant to land to get around the careful provisions of law as to adverse possession. If he failed to show facts sufficient for adverse possession, he could yet use the same inadequate facts to raise a presumption of a grant."

[42] Rights to exclusive use of stream: Tyler v. Wilkinson, 4 Mason, 397, 402, Fed. Cas. No. 14,312; Ingraham v. Hutchinson, 2 Conn. 584; Strickler v. Todd, 10 Serg. & R. (Pa.) 63, 69, 13 Am. Dec. 649. Right of way: Hill v. Crosby, 2 Pick. (Mass.) 466, 13 Am. Dec. 448. English cases on water rights: Wright v. Howard, 1 Sim. & S. 190, 203; Bealey v. Shaw, 6 East, 208, 215. In Tyler v. Wilkinson, supra, Justice Story says, referring to the acquirement of an exclusive right to the use of the waters of a stream: "Now this may be either by

This rule is an interesting example of a double application of the so-called presumption to reach a desired result. The period of the beginning of the reign of Richard I (1189) was adopted by the courts of law as the period to which, in all matters of prescription or custom, living memory should be required to extend. This was in analogy to a certain statute fixing this as the period from which the limitation in a real action was to run.[43] At the time of the adoption of this rule, the period to be covered was 86 years. As time wore on, however, the period became so long that it was impossible for living memory to extend back so far. Accordingly, it was necessary to establish an intermediate rule before the main rule could operate, to wit, that usage during living memory was equivalent to usage back to 1189, or, as it was expressed in the language of presumptions, raised a presumption of usage to that time. The main rule then came into force that usage from that time was equivalent to proof of a legal origin, or, to again express it as a presumption, it would be conclusively presumed from such proof that a legal origin existed.[44] The period of living memory has in England been fixed by statute.[45] Where it is not so fixed, the courts have usually adopted the periods mentioned in the statutes of limitations in cases analogous in principle.[46] These two so-called presumptions are merely rules of the law of property. There is no idea of logical inference connected with them. If such inference happens upon the circumstances of any particular case to exist, it does not in any sense form the basis of the rules, for they would be enforced regardless of it, and often in spite of it.[47]

a grant from all the proprietors whose interest is affected by the particular appropriation, or by a long, exclusive enjoyment without interruption, which affords a just presumption of right. By our law, upon principles of public convenience, the term of twenty years of exclusive, uninterrupted enjoyment has been held a conclusive presumption of a grant or right."

[43] St. Westm. I. c. 39.

[44] Bryant v. Foot (1867) L. R. 2 Q. B. 161, opinion of Cockburn, C. J.

[45] 2 & 3 Wm. IV. c. 71.

[46] Coolidge v. Learned, 8 Pick. (Mass.) 504, 508; Ricard v. Williams, 7 Wheat. (U. S.) 59, Story, J., at page 110 (5 L. Ed. 398).

[47] Bryant v. Foot (1867) L. R. 2 Q. B. 161.

SAME—CAPACITY OF INFANTS TO COMMIT CRIME.

52. Proof that an infant is under seven years of age is conclusive evidence that he is incapable of committing a crime.

This is another of the absolute rules of law usually expressed in the language of evidence, and called a conclusive presumption.

Of the same character are the so-called "conclusive presumptions" to the effect that a female infant under ten is incapable of giving consent to sexual intercourse,[48] and that a male infant under fourteen is incapable of committing rape.[49] They are all rules in the criminal law, which the courts apply, and, discussing them usually in connection with matters of evidence, speak of them as "presumptions."

SPURIOUS PRESUMPTIONS.

53. There are certain rules, called "presumptions," which are merely modes of expressing certain applications of the principles of the subject of judicial notice, or are statements of certain general principles and maxims in the law, having nothing to do with evidence or inference.

In reading the cases, and seeking to classify the many so-called presumptions met with as either legitimate or spurious, it will be helpful if the element of equivalence fully explained in section 40 be used as a test.

[48] Russ. Crimes, 810.

[49] Reg. v. Jordan, 9 Car. & P. 118; Reg. v. Brimilow, Id. 366; State v. Handy, 4 Har. (Del.) 566; State v. Pugh, 7 Jones (N. C.) 61. See, also, McKinny v. State, 29 Fla. 565, 10 South. 732, 30 Am. St. Rep. 140. Under the prevailing American doctrine, evidence is allowed to show puberty, and hence capacity. People v. Randolph, 2 Parker, Cr. R. (N. Y.) 174; Com. v. Green, 2 Pick. (Mass.) 380; Wagoner v. State, 5 Lea (Tenn.) 352, 40 Am. Rep. 36; Gordon v. State, 93 Ga. 531, 21 S. E. 54, 44 Am. St. Rep. 189. And where the presumption is held rebuttable the burden is on the prosecution to show capacity by reason of puberty. Hiltabiddle v. State, 35 Ohio St. 52, 35 Am. St. Rep. 592.

If the case be one where a rule is involved which will fix upon a fact or state of facts proved by a party upon whom the burden rests of introducing evidence, such a character that another fact or state of facts material to the party's case will be deemed either prima facie or conclusively established, then the case is one of a legitimate presumption.

As the burden of proceeding is shifted by the establishment of a prima facie case, and as the legitimate presumption operates (in all cases except the few of conclusive presumption) to establish a prima facie case with respect to the fact in issue which it affects, be that fact a principle or evidentiary fact, it can frequently be determined with what meaning the term "presumption" is being used in a given case, by examining to see whether the court has recognized any power in the so-called presumption to shift the burden of going forward with the evidence.

Of the mass of so-called "presumptions" in which the cases abound, those which may be referred by reason of their effect to particular branches of the law, some of which have been commented on, are easily disposed of as rules in the law of the particular subjects to which they relate. There are, however, a large number which lie outside of this class. They have no such influence on the effect of evidence, and many times no influence at all. They are, perhaps, general principles, referable to no particular branch of the law, or applications of the theory of judicial notice stated in the language of presumptions. In any event, they have nothing to do with evidence either in its use or effect.

Experience with respect to certain facts is so general and so uniform, and men's actions have been so universally based upon an assumption of their truth, that they have been stated in the form of rules in the guise of presumptions.[50] In this shape they have crept into the law of presumptions, and attached themselves to the law of evidence. It is to them that

[50] In Leighton v. Morrill, 159 Mass. 271, 34 N. E. 257, Justice Holmes says (page 278 of 159 Mass., and page 257 of 34 N. E.): "Presumptions of fact generally are question of fact. They are merely the major premises of those inferences which juries are at liberty to draw, in the light of their experience as men of the world, from the facts directly proved."

much of the confusion of thought in regard to the subject of presumptions may be traced.

SAME—PRESUMPTION OF SANITY.

54. Every person will be presumed to be sane until the contrary is shown.

It is doubtful if this means much more than that judge and jury, being sensible persons, act in accordance with the well-known fact that human beings, as a rule, are sane, and that in considering the nature and effect of their actions, in court as elsewhere, it will be assumed that they are rational unless sanity be put in issue. Sanity is one of those facts, mental and physical, which, as elements of the normal man, are judicially noticed. It will be assumed that a man is sane just as it will be assumed that he has two hands and can see, hear, etc. [51] But this is not saying that, if any one of these facts be put in issue, there is any rule as to quantity of proof or the burden of proof different from the rules governing other facts in issue. The statement, then, that a person will be presumed to be sane until the contrary is proven, is not correct; for, if any proof is made necessary by the fact being put in issue, the ordinary rule prevails that the person alleging it must prove it, whether it be sanity or insanity which is alleged.[52]

[51] In State v. Pike, 49 N. H. 399, p. 443, 6 Am. Rep. 533, it is said: "There are certain natural or usual causes, effects, conditions, and customs, generally within the reach of the experience or the observation or the reason of men, which a jury are justified in finding by an inference or presumption of fact when there is no testimony showing an exceptional instance in the case on trial. * * * The presumption of sanity is not an artificial or legal presumption, but a natural inference of fact, to be made by a jury from the absence of evidence to show that a party did not enjoy that soundness which experience proves to be the general condition of the human mind." In Hunt v. Graham, 15 Pa. Super. Ct. 42, we have a plain illustration of a principle of judicial notice stated in the language of presumptions. There it was held that it is presumed that a boy 15½ years of age is of sufficient capacity to be sensible of danger and to have the power to avoid it. See, also, Green v. So. Pac. R. R. Co., 122 Cal. 563, 55 P. 577.

[52] O'Connell v. People, 87 N. Y. 377, 41 Am. Rep. 379; Rogers v.

In criminal cases, where sanity is put in issue by the defense of insanity being set up, the prevailing doctrine is that it must be proved as a part of the prosecution's case, in the same way as other facts; i. e., beyond a reasonable doubt. If, after the evidence is all in, there is a reasonable doubt as to the accused being sane, there is a reasonable doubt as to his being guilty, and hence he cannot be convicted.[53] This seems the correct doctrine on principle, though it has not always been followed. It has been held that where the accused sets up the defense of insanity he must establish it by a preponderance of evidence,[54]

Armstrong Co. (Tex. Civ. App.) 30 S. W. 848; People v. Garbutt, 17 Mich. 9, 97 Am. Dec. 162. In People v. Garbutt, Chief Justice Cooley says (page 23 of 17 Mich.): "They [the prosecution] are at liberty to rest upon the presumption of sanity until proof of the contrary condition is given by the defense. But, when any evidence is given which tends to overthrow that presumption, the jury are to examine, weigh, and pass upon it, with the understanding that, although the initiative in presenting the evidence is taken by the defense, the burden of proof upon this part of the case, as well as upon the other, is upon the prosecution to establish the conditions of guilt." In Sutton v. Sadler (1857) 3 C. B. (N. S.) 87, there is an intelligent discussion of the so-called presumption of sanity, which is said not to be a presumption of law, and not to shift the burden of proof.

In a recent cause celebré, where the defense of insanity was interposed, the trial judge in his instructions to the jury seems to have misconceived the principle of burden of proof as applied to the question of sanity, so clearly stated above by Mr. Justice Cooley. The instruction referred to was: "The legal presumption is that the defendant was sane when he committed the act, and it was not necessary for the prosecution to show that he was not sane. Sanity being the normal and usual condition of the community, the law presumes sanity; hence a prosecutor may work on the presumption of sanity. Whoever denies it must prove insanity. The burden of overthrowing the presumption of sanity, and of showing insanity, is upon the person who makes the allegation." Extract from charge of Mr. Justice Fitzgerald in People v. Thaw, as printed in New York Sun, April 10, 1907.

[53] State v. Jones, 50 N. H. 369, 9 Am. Rep. 242; Lilly v. People, 148 Ill. 467, 36 N. E. 95; Plummer v. State, 135 Ind. 308, 320, 34 N. E. 968, 971; Armstrong v. State, 30 Fla. 170, 197, 11 South. 618, 17 L. R. A. 484.

[54] Com. v. Bezek, 168 Pa. 603, 617, 32 Atl. 109, 111; Com. v. Eddy, 7 Gray (Mass.) 582; Cavaness v. State, 43 Ark. 331; People v. Ward, 105 Cal. 335, 38 Pac. 945; State v. Schaefer, 116 Mo. 96, 22 S. W. 447; State v. Bruce, 48 Iowa, 530, 30 Am. Rep. 403; Maxwell v. State,

and in several instances the courts have gone so far as to say the accused must establish the defense of insanity beyond a reasonable doubt.[55]

In civil cases the ordinary rule prevails. Sanity, if put in issue, must be proved by the party relying upon it, and the same is true of insanity. He who affirms and relies upon the one fact or the other must establish it by a preponderance of evidence.[56]

Suppose that A. brings a case against X., and seeks damages for breach of contract, and the fact of the sanity of X. is not put in issue, A. does not have to prove it by introducing evidence, though it is essential to the validity of the contract. X.'s sanity will be taken for granted. This is because the fact that sanity is an ordinary attribute of a human being is judicially noticed. Another way of describing it is to say that sanity is presumed; but it is a misleading way, because it puts in the shape of a

89 Ala. 150, 7 South. 824; State v. Lawrence, 57 Me. 574; King v. State, 91 Tenn. 617, 647, 20 S. W. 169, 176.

[55] State v. Spencer, 21 N. J. Law, 196. The doctrine expressed in this case was somewhat modified by later decisions which seem to require only a preponderance of evidence. Graves v. State, 45 N. J. Law, 347, 46 Am. Rep. 778. That insanity must be proved "to the satisfaction of the jury": Baccigalupo v. Com., 83 Grat. (Va.) 807, 36 Am. Rep. 795.

[56] Crowninshield v. Crowninshield, 2 Gray (Mass.) 524; Delafield v. Parish, 25 N. Y. 33; Comstock v. Ecclesiastical Soc., 8 Conn. 254, 20 Am. Dec. 100; Pike v. Pike, 104 Ala. 642, 16 South. 689; Rogers v. Armstrong Co. (Tex. Civ. App.) 30 S. W. 848; Francis v. Wilkinson, 147 Ill. 370, 35 N. E. 150; Evans v. Arnold, 52 Ga. 169; Hall v. Perry, 87 Me. 569, 33 Atl. 160, 47 Am. St. Rep. 352; Prentis v. Bates, 93 Mich. 234, 53 N. W. 153, 17 L. R. A. 494; Buckey v. Buckey, 38 W. Va. 168, 18 S. E. 383. In several of the states the presumption is recognized as having some weight in civil cases,—such weight as will relieve the person relying on sanity from introducing any evidence until evidence of insanity is introduced. See Egbert v. Egbert, 78 Pa. 326; Hardy v. Merrill, 56 N. H. 227, 22 Am. Rep. 441; Elkinton v. Brick, 44 N. J. Eq. 154, 15 Atl. 391, 1 L. R. A. 161; Hawkins v. Grimes, 13 B. Mon. (Ky.) 258.

There has been a recent tendency to treat the so-called presumption of sanity as a real presumption, and, as thus effective, to excuse proof; and there have been statutory provisions, such as that in New York (Section 2653a, Code Civ. Proc.) which have been construed as bringing about this result. Dobie v. Armstrong, 160 N. Y. 584, 55 N. E. 302. And see note, 13 Harv. Law Rev. 518.

rule what is not a rule at all, as will be plainly shown by the next illustration. A. claims, under the will of M., certain land, which X. claims as heir, upon the ground that M. was insane when he made the will. A. has the burden of proof and the burden of proceeding as to M.'s sanity. He must prove the sanity of M. by a preponderance of evidence, the same as any other fact. It will thus be seen that, if the rule that sanity is presumed be applied to this case, it would lead to a wrong result. The fact of the sanity of men in general is just as much noticed in this case as in the other; only, sanity being one of the facts in issue, the effect is not the same.[57]

SAME—PRESUMPTION FOR OR AGAINST CONTRIBUTORY NEGLIGENCE.

* **55. There is a presumption that one who claims injury from the negligence of another was guilty of contributory negligence.**

[57] A peculiar misuse of the term "presumption" and misconception of the doctrine of the burden of proof with respect to sanity is found in a recent case. In re Knox's Will, 123 Iowa, 24, 98 N. W. 468. The testator was shown by evidence to have been insane prior to the execution of the will, and to have been so for some time. The court in its instructions to the jury laid down the following doctrine: "Every man is presumed in the first instance to be sane, and the burden of proving insanity is upon him who asserts it; but, insanity having been once established, it will be presumed to continue until the contrary is shown, and the burden is then cast upon him who asserts a return to sanity."

An intelligent discussion of the same subject is found in Branstrator v. Crow, 162 Ind. 362, 69 N. E. 668, where the court said: "The plaintiff had undertaken to establish the testamentary incapacity of the testator at the time he excuted the contested will. This they could do only by maintaining incapacity by a preponderance of the whole evidence. Nothing short of a preponderance would avail them anything. If it turned out that the evidence was equally balanced, the plaintiffs should have failed. So, when the plaintiffs established unsoundness and set the presumption of incapacity going, that only served to create a prima facie case, which would entitle them to a verdict if the defendants introduced no evidence sufficient to overcome it; but, if the defendants by their evidence overthrew the presumption, it was not necessary for them to go further to defeat the plaintiffs."

This is only one way of stating a rule which prevails in some jurisdictions, with respect to actions for negligence, to the effect that the plaintiff must prove as a part of his case freedom from contributory negligence in order to have a recovery.

The doctrine has been, on the other hand, stated universally as follows: "But in other jurisdictions, where the burden is not on the plaintiff of proving approximately that he was not contributory negligent, the presumption is that he was not contributorily negligent." [58]

Strictly speaking, the subject of presumption is not involved, and we are only dealing with a situation where the very simple principle applies which requires that he who alleges a fact must prove it in order to win his case. If it is a material fact in the plaintiff's prima facie case, as it is in many jurisdictions, that he show freedom from contributory negligence, then he must introduce evidence to prove it. [59]

If, on the contrary, it is the established law that contributory negligence is a matter of defense to be alleged and proved by the defendant, then the defendant must, if he relies upon such defense, bring forward the proof.[60]

In the federal courts the rule prevails that contributory negligence is matter of defense. In the absence of any evidence, therefore, the defense, if set up, will fail.[61]

There is no presumption in the case either way, though, as in the case above cited,[62] the language of presumption is used with singularly confusing results in the discussion of the subject.

[58] Lawson, Presumptive Ev. 133.

[59] 2 Cooley on Torts (3d Ed.) p. 1439; Western v. Troy, 139 N. Y. 281, 34 N. E. 780; Manigold v. Black River Traction Co., 81 App. Div. 381; Gallager v. Proctor, 84 Me. 41, 24 Atl. 459; No. Chi. St. Ry. Co. v. Louis, 138 Ill. 9, 27 N. E. 451.

[60] In Indiana, until 1899, the rule that plaintiff must show freedom from contributory negligence prevailed. Nichols v. B. & O. S. W. R. Co., 33 Ind. App. 229, 71 N. E. 170. In that year the rule was changed by statute (Acts 1899, p. 58).

[61] Texas, etc., R. Co. v. Gentry, 163 U. S. 363, 16 Sup. Ct. 1104, 41 L. Ed. 186.

[62] Nichols v. B. & O. S. W. R. Co., 33 Ind. App. 229, 71 N. E. 170.

SAME—PRESUMPTION OF INTENT.

56. Every one will be presumed to intend the natural and probable consequences of his acts.

The laws of human thought and action teach that man acts to accomplish results, and results which, in accordance with the ordinary laws of nature, he thinks will follow. That the results are sometimes different from those which are intended is undoubtedly true. Nevertheless, in judging of a man's intentions, common sense dictates that we go by the results of his actions. It is the ordinary way of doing, as well as the natural way. Judges are cognizant of this method of thought, and think and act in their judicial capacity in accordance with it. It is one of the things that is judicially noticed, and upon it, as a principle, juries are instructed to base their conclusions as to actions which they are called upon to consider. There is no presumption about the matter. The rule is either a simple recognition of a fact of common experience, judicially noticed; or it may be, and sometimes is, a rule of positive law, as when the law declares that one shall be chargeable with the natural consequences of his acts, whether he intended them or not.[68]

[68] Thayer, Cas. Ev. (2d Ed.) p. 42; Jones v. Ricketts, 7 Md. 108. Cases which hold that a person is bound by the terms of a written contract accepted or signed by him, without regard to whether he has read it or not, are illustrations of this principle. Fonseca v. Cunard S. S. Co., 153 Mass. 553, 27 N. E. 665, 12 L. R. A. 340, 25 Am. St. Rep. 660; Germania Ins. Co. v. Memphis & C. R. Co., 72 N. Y. 90, 28 Am. Rep. 113; Hartford Life & Annuity Ins. Co. v. Gray, 91 Ill. 159, 165; Ryan v. Insurance Co., 41 Conn. 168, 19 Am. Rep. 490; Clem v. Railroad Co., 9 Ind. 488, 68 Am. Dec. 653. This so-called presumption is sometimes met with in criminal cases, where the intent with which an act is done becomes material. In Com. v. York, 9 Metc. (Mass.) 93, 43 Am. Dec. 373, where the question was as to the intent, where nothing except the killing was shown, the court hold that malice will be presumed, and use the following language (page 103 of 9 Metc. [Mass.]): "A sane man, a voluntary agent acting upon motives, must be presumed to contemplate and intend the necessary, natural, and probable consequences of his own acts. If, therefore, one voluntarily or willfully does an act which has a direct tendency to destroy another's life, the natural and necessary conclusion from the act is that he intended

As a doctrine of positive law, it is applied to determine man's legal liability for an act committed by him, and has an active effect on the result of the trial. As an expression of a principle of human action in accordance with which judge and jury are to consider the actions of parties and witnesses, it has only a negative effect. In neither shape is it a rule of evidence.

SAME—PRESUMPTION AGAINST CHANGE.

57. It will be presumed that a previously existing state of things continues to exist.

This is only another way of saying that the court takes for granted such matters of common experience as are incidental to the consideration of a case in the way in which any intelligent person does. It does not mean that, if the continued existence of a state of facts is in issue, there is any presumption which will relieve the one party or the other from the ordinary amount of proof required to establish such facts.[64] The fact

so to destroy such person's life. So, if the direct tendency of the willful act is to do another some great bodily harm, and death in fact follows as a natural and probable consequence of the act, it is presumed that he intended such consequence, and he must stand legally responsible for it." See, also, Davis v. Marxhausen, 103 Mich. 315, 61 N. W. 504.

[64] Pickup v. Insurance Co. (1878) 3 Q. B. Div. 594. In Wilkins v. Earle, 44 N. Y. 172, 4 Am. Rep. 655, A. claimed from X., a hotel keeper, damages for the loss of $20,000 which he claimed he deposited in the hotel safe. Evidence was allowed to show that A. had in his possession shortly before the time of making the deposit the securities and bills which he claimed to have deposited. This was on the theory that possession once shown would be presumed to continue. The court use the following language (page 192 of 44 N. Y.): "There is a legal presumption of continuance. A partnership once established is presumed to continue. Life is presumed to exist. Possession is presumed to continue. The fact that a man was a gambler twenty months justifies the presumption that he continues to be one. An adulterous intercourse is presumed to continue. So of ownership and nonresidence." The word "presumption" here obviously means nothing more than inference. See State v. Plym, 43 Minn. 385, 387, 45 N. W. 848, where the existence of any presumption as to continuance of life is expressly disclaimed. Possession shown to be adverse at one time presumed to continue adverse: Barrett v. Stradl, 73 Wis. 385, 41 N. W. 439, 9 Am.

that such condition has been shown to exist at any particular time is one fact, from which an inference or presumption may be drawn that it continued to exist. In this connection, therefore, the word "presumption" is used synonymously with "inference," as well as to express a general principle that courts act upon the assumption that such inference, as a matter of common experience, will be drawn.

A. sues X. to have a deed declared void on the ground the grantor was insane at the time of execution. A. proves the grantor was insane at times both before and after the time of the execution, but it appears that the insanity was of an intermittent character. There is no presumption that the insanity existed at the time of the execution of the deed. [65]

Subsequent facts are frequently relied upon to prove a previously existing state of facts. The principle underlying such proof is the same, to wit, inference; and the inference may be strong or weak, according to the nature of the facts. There is no question of presumption involved, though it is often spoken of as such.[66]

PRESUMPTION AS TO LAW OF ANOTHER STATE OR COUNTRY.

58. In the absence of proof, the law of another state will be presumed to be the same as that of the forum where the case is being tried.

St. Rep. 795. Presumption of continuance of residence: Bowdoinham v. Inhabitants of Phippsburg, 63 Me. 497; Rixford v. Miller, 49 Vt. 319. Possession as tenant presumed to continue of that character: Leport v. Todd, 32 N. J. Law, 124. Insanity once shown presumed to continue: Taylor v. Trich, 165 Pa. 586, 30 Atl. 1053, 44 Am. St. Rep. 679.

[65] In McPeck's Heirs v. Graham's Heirs, 56 W. Va. 200, 49 S. E. 125, 127, the court cite with approval the statement: "If the malady is occasional or intermittent in its nature, the presumption [of continuance] does not arise; and he who relies on insanity proved at another time must prove its existence also at the time alleged."

[66] Gibson v. Brown, 214 Ill. 330, 338, 73 N. E. 578. In this case it became material to show whether the grantor in a deed dated in 1858 was married, and it was held that the recital in a deed executed by the same grantor in 1862 that he was a bachelor, while not conclusive, would be "presumptive evidence" that he was unmarried in 1858.

This is an interesting illustration of the effect of the non-application of the doctrine of judicial notice. It goes without saying that there is no question of presumption involved. The courts in their decision of questions apply the law as they judicially know it; i. e., the law of their own forum. They have no power, except where the principle of judicial notice comes in and gives them the right, to inquire into the laws of another country or state. If this doctrine is inapplicable, then a situation exists which has given rise to the expression that a presumption exists that the law of such other state is the same as that of the forum of trial. This, of course, only means that, if either party relies upon the law of another state, he must, to have it considered, offer proof.[67]

The cases in which questions as to the law of another state or country have arisen are very numerous. They may be roughly divided into two classes:[68]

(1) Those in which the common law has been called in question, in which cases the courts have uniformly laid down the

[67] Pauska v. Daus, 31 Tex. 67; Burgess v. Western Union Telegraph Co., 92 Tex. 125, 46 S. W. 794, 71 Am. St. Rep. 833; Banco De Sonora v. Bankers' etc., Co., 124 Iowa, 576, 100 N. W. 532, 104 Am. St. Rep. 367; Cavallaro v. Texas, etc., R. R., 110 Cal. 348, 42 Pac. 918, 52 Am. St. Rep. 94.

[68] In a well-considered article upon "Presumption of the Foreign Law" in 19 Harvard Law Rev. p. 401, the cases are divided into three classes: First. Where the court judicially notices that the foreign state has the same system of law as that of the forum, the court of the forum will presume that the law of the foreign state is the same as that of the system of law (exclusive of statutory changes) fundamentally common to both; otherwise, it will recognize no presumption at all. Second. The cases which treat the law of the forum, even though it be statutory, as always applicable, in the absence of proof of the foreign law. Third. The cases where, when judicial notice is taken that the foreign state has the same system of law, the court will presume the law to be the same as that of the system of law (exclusive of statutory changes) common to both; and, when judicial notice is taken that the foreign state has a different system of law, the court will apply, in the absence of proof of the foreign law, the law of the forum, whether statutory or otherwise.

A full citation of the cases will be found in this article, and a helpful discussion of them from the point of view taken. It is believed, however, that the cases will classify themselves somewhat more simply as set forth in the text.

rule that the common law of another jurisdiction, in which it is judicially noticed that the common law prevails, will be presumed to be the same as the common law of the forum of trial.[69]

It is to be noticed that the first step and the essential element in these cases is the exercise by the court of the function of judicial notice in determining the question whether the common law does or does not exist in the jurisdiction in question.[70]

This matter once determined, the further treatment of the situation is simply that applicable to the subject of proof in general. He who alleges must prove, and in the absence of any proof the case upon the issue involved must go against him.

(2) Those in which the statutory law of another jurisdiction has become material, in which cases the courts have either (a) laid down the rule that the statutory law will be presumed to be the same as in the forum of trial, or (b) declared that they will not presume the statutes to be the same as in the forum of trial, depending upon whether or not the party relies upon the existence or nonexistence of such statutes for the success of his case.

As an illustration of rule (a) the following may be taken: A. sued X. for injuries sustained in Illinois through the negligence of a fellow servant. Suit was brought in Wisconsin,

[69] Musser v. Stauffer, 178 Pa. 99, 35 Atl. 709. In this case it was held that a defense to an action on a contract executed in Virginia, which, under Pennsylvania laws, was a good defense, would be held sufficient, on the theory that the same common law prevailed in Virginia. Peter Adams Paper Co. v. Cassard, 206 Pa. 179, 55 Atl. 949, where it was held that the common law which prevails in Pennsylvania, preventing recovery against a married woman as a surety, would be presumed to prevail in New York, although as a matter of fact the statutes in New York have changed the common law. Gates v. Newman, 13 Ind. App. 392, 46 N. E. 654; Wells v. Schuster, etc., Bank, 23 Colo. 534, 48 Pac. 809; Gooch v. Faucett, 122 N. C. 270, 29 S. E. 362, 39 L. R. A. 835; Aslanian v. Dostumian, 174 Mass. 328, 54 N. E. 845, 47 L. R. A. 495, 75 Am. St. Rep. 348.

[70] Aslanian v. Dostumian, 174 Mass. 328, 54 N. E. 845, 47 L. R. A. 495, 75 Am. St. Rep. 348. Here the court took judicial notice that the common law does not exist in Turkey, and declined to uphold a defense to a suit on a piece of commercial paper payable in Turkey under the principles of the law merchant.

where the statutes permitted recovery. X. claimed no recovery could be had under the law of Illinois, but no proof was offered as to such law. The court held that the law of Illinois would be presumed to be the same as in Wisconsin, and that recovery could be had.[71]

In this case, as in many similar ones, the result reached was simply the enforcement of the rule that a party relying upon the law of another state must prove it. Here X. relied upon the law of Illinois as a defense. He offered no proof, and the court could not take judicial notice of it. The result was that X. failed in his defense. To state this result in the language of presumptions,—i. e., that the court will presume that the law of Illinois was the same as the law of Wisconsin—in reality meant nothing further.[72]

Rule (b) above stated, to the effect that the statutes of a sister state will not be presumed to be the same as in the forum of trial, may be illustrated as follows: A. sued X. in Wisconsin on a note made and payable in Illinois. X. pleaded usury, but failed to prove the laws of Illinois on this subject. The statutes of Wisconsin imposed forfeiture as a penalty in cases of usury. X. claimed the benefit of the supposed presumption that the statutes of another state were the same as the statutes of Wisconsin. It was held that the statutes would not be presumed to be the same.[73]

[71] McCarthy v. Whitcomb, 110 Wis. 113, 85 N. W. 707.

[72] Other cases which, if analyzed, will be found to be of the same character, are In re Harrington's Estate, 140 Cal. 244, 73 Pac. 1000, 98 Am. St. Rep. 51; Fisher v. Donovan, 57 Neb. 361, 77 N. W. 778, 44 L. R. A. 333; Woolacoot v. Case, 63 Kan. 35, 64 Pac. 965; Dignan v. Nelson, 26 Utah, 186, 72 Pac. 936.

[73] Hull v. Augustine, 23 Wis. 383. This case is a particularly significant one, for the reason that the doctrine has been laid down in Wisconsin quite strongly that the courts will presume the statutory law of another state to be the same as in Wisconsin. It shows that, when the courts are brought face to face with the proposition of allowing the rule to be used as a real presumption or rule of law, taking the place of proof, they decline to go to this length, although they still find difficulty in getting away from the language of presumptions. In this case they say: "In the absence of proof the court will presume that the laws of a foreign state, nothing being shown to the contrary, correspond to our own; but this presumption is not in-

The results reached by the application of rule (b) are no different from those following the application of rule (a).

In the former case, as in the latter, the effect is simply to leave upon the shoulders of the party who has the burden of proving a case or defense the task of proving it, and in case of his failure to do so the court have fallen into the way of explaining the result by saying they will not presume that that is a fact which ought to have been proved, but was not.[74]

SAME—PRESUMPTION OF REGULARITY AND LEGALITY.

59. Presumption that public officers perform their duty, and do not exceed their lawful authority.

The courts here simply act, in the consideration of facts coming before them, upon the theory which governs the actions of all men. Where the matter is not in issue as a principal or evidentiary fact, the court assumes, as do all men, that officers conduct their business in the ordinary way, and perform their duties regularly. Similar to the above is the so-called "presumption" that the regular course in business matters or the conduct of affairs is followed.

Attempts to make use of this presumption of regularity as a substitute for proof have frequently been made. They have failed for the reason that, when the courts have been brought to a close examination of its nature, they have recognized its real character, and have refused to go to the length which the unconsidered language of some of the decisions would warrant. Where it is incumbent upon a party to prove facts A, B, and C to support his case, and he proves facts A and C, but gives no

dulged in when the foreign law imposes a penalty or works a forfeiture, as in the case of usury."

See, also, Bird v. Olmstead (Tenn. Ch. App.) 53 S. W. 978; Dickey v. Bank, 89 Md. 280, 43 Atl. 33.

[74] Robb v. Washington & Jefferson College, 185 N. Y. 485, 78 N. E. 359; Dickey v. Pocomoke City Bank, 89 Md. 280, 43 Atl. 33; Miller v. Watson, 146 Ill. 523, 34 N. E. 1111, 37 Am. St. Rep. 186; Pardoe v. Merritt, 75 Minn. 12, 77 N. W. 552; Meurer v. Railway Co., 11 S. D. 94, 75 N. W. 823, 74 Am. St. Rep. 774; Murphy v. Collins, 121 Mass. 6.

evidence justifying the inference of the existence of fact B, the presumption of regularity cannot supply the lack of proof.[75]

SAME—PRESUMPTION OF INNOCENCE.

60. Every person will be presumed to be innocent until his guilt is shown beyond a reasonable doubt.

This is only one way of expressing the fundamental principle of our criminal procedure that, to convict of crime, the evidence must show guilt beyond a reasonable doubt. This principle is not even remotely connected with the subject of inference, and it is curious that it should ever have been ex-

[75] In U. S. v. Carr, 132 U. S. 644, 10 Sup. Ct. 182, 33 L. Ed. 483, the facts were as follows: A. sued the government for pay for carrying the mails under a contract which required him to carry it by a certain route, stopping at certain stations. The proof showed that he took a shorter route on the return trip, leaving out stations specified in the contract, but A. claimed that his omission to stop at such stations must have been known to the postmasters at the termini of his route, and knowledge on the part of the government would be presumed; that acquiescence was thus established. Chief Justice Fuller says (page 653, 132 U. S., and page 185, 10 Sup. Ct. [33 L. Ed. 483]): "The department did not direct, or affirmatively permit, the contractor to pursue the course he did; and if he could recover, in whole or in part, upon the ground of an acquiescence equivalent to assent in a certain mode of dealing with the subject-matter of the contract, the burden was on him to show knowledge or information by the department of his conduct in the premises. No evidence to establish such knowledge or information having been adduced, the case was made to rest upon the presumption that the postmasters at the termini where the schedules of the time of the arrival and departure of the mails were kept, and registers thereof made and returned, were acquainted with the terms of the contract and claimant's noncompliance therewith, and, this being presumed, upon the further presumption that they must have reported the failure in performance of their duty to the department." Adopting the language of Mr. Justice Strong in U. S. v. Ross, 92 U. S. 281, 284, 23 L. Ed. 707, Chief Justice Fuller then continues: "The presumption that public officers have done their duty, like the presumption of innocence, is undoubtedly a legal presumption, but it does not supply proof of a substantive fact. * * * Nowhere is the presumption held to be a substitute for proof of an independent and material fact." See, also, Hilton v. Bender, 69 N. Y. 75. For further instances of the application of this presumption, see

pressed in the form of a presumption.[76] It is only a question of proof, which the policy of our law has settled in a certain way—one way in civil, another in criminal, cases. What this policy rests upon it is not material here to inquire. That there is no presumption of innocence, and that the so-called rule has absolutely no effect on the evidence, prima facie or otherwise, may be easily seen by the following illustration: M. dies, and leaves a legacy to A., provided, at the time of M.'s decease, A. shall have lived a life innocent of all crime. M.'s executor, X., fails to pay the legacy. A. sues X., and alleges that he was at M.'s death innocent of all crime. X. denies this allegation. Innocence would here become a fact in issue material to A.'s case, and he would have to prove it the same as any other fact. There is no presumption which would help him.

SAME—PRESUMPTION OF SURVIVORSHIP.

61. In the case of two or more persons lost at sea, there is no presumption that one survived the other, or that there was a survivor, or that both died at the same time. Either fact, if material, must be proved by the party alleging it, in the ordinary way.

The question of survivorship is one which has been made the subject of several alleged presumptions. It has been a misuse of language, however,—a roundabout way of saying that a person who alleges a fact must prove it by a preponderance of evidence, or it will be found against him. If it is material to the case of A. to show that R. survived S., this must be proved in the usual way; and, if it is not so proved, the case will result as though both died at the same time, but not because there is any presumption in the matter. When it is said that "the parties must be presumed to have died at the

Union Cent. Life Ins. Co. v. Woods, 11 Ind. App. 335, 39 N. E. 205; Ivy v. Yancey, 129 Mo. 501, 31 S. W. 937.

[76] A striking example of the confusion into which the mind may be led by the use of the language of presumption in the discussion of the question of proof of guilt is found in Hemingway v. State, 68 Miss. 371, 417, 418, 8 South. 317. See, also, Morehead v. State, 34 Ohio St. 212; Brewer v. Bowersox, 92 Md. 567, 48 Atl. 1060.

same time," [77] all that is meant is that, as the fact is incapable of proof, the one upon whom the onus lies fails; and persons thus perishing will be treated as having died at the same time, for the purpose of disposing of their property.[78]

[77] Sir Herbert Jenner, in Satterthwaite v. Powell, 1 Curt. Ecc. 705.

[78] Taylor v. Diplock, 2 Phillim. Ecc. 261; In re Goods of Selwyn, 8 Hagg. Ecc. 748; Newell v. Nichols (1878) 75 N. Y. 78, 31 Am. Rep. 424. This case was as follows: M. died in 1870. By her will, she left her property in separate trusts,—one for her daughter, one for her son, and one for her husband. The principal of the first two funds was to go on the death of the beneficiary to the heirs of his or her body, or, failing such heirs, to any testamentary appointee of such beneficiary, and, if no such appointment, then to heirs of the body of the testatrix, and, if no such heirs, then to A. The principal of the third fund, upon the husband's death, was to go to the heirs of the body of the testatrix then living, and, failing such heirs, to A. M.'s husband, two children, and mother survived her, but in 1875 were lost at sea, by the sinking of a ship. A. claimed the estate, as in default of heirs of the body of the children or of M., the testatrix, or of testamentary appointment by the children. The question of exact time of death of the persons lost at sea thus became material. The court say: "Is there a presumption that they died at the same time, or that either person survived the others, or that there was a survivor, without defining which? There is no legal presumption, which courts are authorized to act upon, that there is a survivor, any more than that there was a particular survivor. It is not claimed that there is any legal presumption that the children died at the same time. Indeed, it may be conceded that it is unlikely that they ceased to breathe at precisely the same instant, and, as a physical fact, it may perhaps be inferred that they did not. But this does not come up to the standard of proof. The rule is that the law will indulge in no presumption on the subject. It will not raise a presumption by balancing probabilities, either that there was a survivor, or who he was." The result of the doctrine that there is no presumption as to survivorship is that property rights are disposed of upon the theory that the several parties died at the same time, unless survivorship, if asserted, is supported by sufficient affirmative proof. See Coye v. Leach, 8 Metc. (Mass.) 371, 41 Am. Dec. 518; Johnson v. Merithew, 80 Me. 111, 13 Atl. 132, 6 Am. St. Rep. 162; Sanders v. Simcich, 65 Cal. 51, 2 Pac. 741. The English doctrine recognizes no presumption as to survivorship, and also refuses to dispose of property on theory of death at the same time. A curious case arose in Wing v. Angrave, 8 H. L. Cas. 182. A. claimed property under the will of M., in default of the exercise of a power of appointment by X., the daughter to whom the property had been devised for life with power to appoint. X. had made a will giving the property to her husband, Y., subject to interests given to her children,

SAME—PRESUMPTION OF KNOWLEDGE OF THE LAW.

62. Every one is presumed to know the law.

Policy in the administration of the law dictates that it should be applied to every one, and no member of the community should escape legal responsibility for his acts. "Ignorance of the law excuses no one" is the correct way of expressing what is often incorrectly expressed as a presumption in the words, "Everyone will be presumed to know the law." [79]

CONFLICTING PRESUMPTIONS.

63. There is, strictly speaking, no such thing as "conflicting presumptions." "Conflicting inferences" is what is meant by the phrase.

Much has been said in the cases of conflicting presumptions.[80] What is meant is conflicting inferences, which are

and, in case her husband should die in her lifetime, then to W. Y. had also made a will giving his property to his wife, and, in case she should die in his lifetime, then to W., in trust for his children, and, in case all should die under age, then to W. absolutely. X. and Y. and their children were lost at sea, being all swept away by one wave. W. claimed the property upon the theory that he was both the appointee of the wife and the legatee of the husband, and, whichever one was the survivor, he would be entitled. It was held that, in order to hold the property, W. must prove some state of facts under which he would be entitled; that there was no presumption, in the absence of proof as to survivorship, that the parties died at the same time; and that as W. had not proved that X. survived Y., nor that Y. survived X., nor that both died at the same time, in any one of which events he would have been entitled, the property would be disposed of under the father's will, as though X. and Y. were entirely out of the case, and the power of appointment had not been executed.

[79] 3 Harv. Law Rev. 165. In Martindale v. Falkner, 2 C. B. 719, Maule, J., says: "There is no presumption in this country that every person knows the law. It would be contrary to common sense and reason if it were so." U. S. v. Anthony, 11 Blatchf. (U. S.) 200, Fed.

[80] Rex v. Inhabitants of Twyning, 2 Barn. & Ald. 386; Sharp v. Johnson, 22 Ark. 79; Town of Greensborough v. Town of Underhill, 12 Vt. 604.

present in every case where there is evidence introduced on both sides of a question in issue. If we take the term "presumption" as meaning a rule fixing the prima facie effect of certain facts, then, when rebutting evidence is introduced, the presumption, as such, has no further force. The question becomes one simply between conflicting proof and the inferences to be drawn therefrom. When the court discusses conflicting presumptions, it, therefore, talks of conflicting inferences.[81]

Cas. No. 14,459; Winehart v. State, 6 Ind. 30. Where the fact of whether a person knows the law is in issue, there is no presumption which supplies the place of proof. Reg. v. Mayor, etc., of Tewkesbury, L. R. 3 Q. B. 629; Black v. Ward, 27 Mich. 191, 200, 15 Am. Rep. 162.

[81] State v. Plym (1890) 43 Minn. 385, 45 N. W. 848. On the trial of X. for bigamy, it is shown that X. left Sweden, and came to America, in 1884, leaving a wife and children; that she sent word to him in August, 1887; that he was married in 1889 to another woman. Is there any presumption that the first wife was living at the time of the second marriage? Do the so-called presumptions of innocence and of continuance of life conflict, and which is the stronger? Michael, J., says: "Neither is it true that there is any presumption of law one way or the other as to the continuance of life. It is a mere presumption of fact, which is subject to be controlled by facts and circumstances, and consequently by no means of equal strength at all times and under all circumstances; as, perhaps, more correctly speaking, there is no rigid presumption one way or the other. The evidence that a person was living at a particular time is but one of the facts to be considered in determining the question whether he was living at any future given time, and which is to be considered with reference to accompanying circumstances, such as the length of time intervening, the age and health of the person, and the like. Its weight as evidence will be affected by any circumstances affecting the probability of the continuance of life, or rendering it probable that death had occurred." See, also, Rex v. Inhabitants of Harborne, 2 Adol. & E. 540; Reg. v. Willshire, 6 Q. B. Div. 366; Leach v. Hall, 95 Iowa, 611, 64 N. W. 790; State v. Pike, 49 N. H. 399, 444, 6 Am. Rep. 533.

CHAPTER VI.

ADMISSIONS.

64. Admissions Defined.
65. Direct and Indirect Admissions.
66. Admissibility.
67–68. Admissions of Parties.
69–76. Admissions of Third Persons.
77–79. Admissions Pending Negotiations for Compromise.
80. Civil and Criminal Cases.
81. Proof of Admissions.
82. Effect of Admissions.

ADMISSIONS DEFINED.

64. An admission may be defined as a statement or act which amounts to the affirmance of some fact material to the issue, where such affirmance operates, at the time of trial, against the interest of the party responsible for it.

Formal Admissions as Distinguished from Evidential.

There are two kinds of admissions, and it will be well to distinguish them clearly at the start. There is, first, the formal admission, which may be said to be addressed to the court, and may be made by a party in his pleading, by stipulation, or by statement in open court. Secondly, there is the statement of a fact at some previous time inconsistent with a fact attempted to be established at the time of trial; a statement which, when brought into the case, comes in as a piece of evidence, direct or circumstantial, from which the court and jury may draw an inference as to the truth of the fact in issue.

As to the formal admissions, little need be said. They simply fix the relation between the parties as to the facts. They help to define the issues concerning which evidence is to be heard, but they are not in themselves evidence.

Admissions of this character bind the parties conclusively throughout the entire litigation, unless it be, upon application,

the court relieve the party from the effect of such admission.[1]

A distinction must be made between those formal admissions, addressed to the court, and which operate solely to excuse proof and thus limit the issues, and statements and allegations contained in pleadings or other papers used in the progress of the case, which are of an evidential nature and are used in that character to prove some facts or fact.

Pleadings may contain both kinds of admissions. So far as the first is concerned, the pleading need not be introduced in evidence in order that it may be availed of. It is a part of the record, and as such the court will use it to help in defining the issues which are to be the subject of proof.

As to the second, it seems that the pleading or other paper containing it should be introduced, and that, unless so introduced, it cannot be used as a part of the evidence.

DIRECT AND INDIRECT ADMISSIONS.

65. Evidential admissions may be either direct statements as to the facts in issue or they may be statements of other facts or conduct from which the facts in issue may be inferred.

As to the second kind of admissions, those which may be called evidential admissions, they may be of many different kinds with respect to form and character; but in general they fall into two classes: First, direct statements of main facts in issue; second, statements of facts from which inferences may be drawn as to main facts in issue. Both kinds of statements may be called evidential admissions, because of the fact

[1] Stemmler v. Mayor, etc., 179 N. Y. 473, 72 N. E. 581. In this case the records show that upon the trial the following admission was entered on the record: "It is admitted that during the time John A. Stemmler was ousted from office the defendant paid the salary to Joseph McGuire." Upon a second appeal the defendant sought to show that there was no evidence as to such payment. The court said: "A stipulation made by the parties, or their attorneys, with respect to the facts in a case, for the purpose of evidence, is general, and not limited in respect of time or occasion, but stands in the case for all purposes until the litigation is ended, unless the court, upon application, shall relieve either or both of the parties from its operation."

that they are introduced as evidence. It will be readily seen, however, that they may differ very much in conclusiveness; that in the latter case they are likely to be in the nature of circumstantial evidence, as to which there is always much uncertainty, while in the former case they are likely in themselves to carry conviction.

As to the former there is nothing to be said, except that, to be available, the statement which constitutes the admission must be proved in the ordinary way. The form in which the admission is made is immaterial, so that it amounts to a statement of fact, and is not a statement of opinion or a promise.[2]

The proof of a direct admission is usually by the introduction of testimony, oral or written, as to the language constituting the admission.[3]

[2] Where, in a suit for damages arising from action taken by a board of health, it was sought to show that the plaintiff suffered no damage, and to that end there was introduced as an admission a statement made by the plaintiff, at the time of the action of the board of health, to the effect that he would claim no damages, it was held that the language did not constitute an admission. Driscoll v. City of Taunton, 160 Mass. 486, 36 N. E. 495. And an irresponsible expression of opinion will not be treated as an admission, as where a legatee under a will, a boy of 17, who had been sitting up all night with testator, had said testator was crazy and did not know what he was doing, and that "he was drinking and crazy." Gessell v. Baugher, 60 Atl. 481, 100 Md. 677. See, also, Aschenbach v. Keene, 46 Misc. Rep. 600, 92 N. Y. Supp. 764.

[3] The statement constituting the admission may be oral or written. Its form is immaterial. So, also, are the place and circumstances attending its making. It may have been heard by witness over a telephone. Wolfe v. Railway Co., 97 Mo. 473, 11 S. W. 49, 3 L. R. A. 539, 10 Am. St. Rep. 331. It has even been held that one who overheard one side of a conversation by telephone, which was indicative of what was said at the other end, may give the side overheard, in evidence. To render it admissible, however, the fact of the party against whom it is sought to be used being actually at the other end, and engaged in the conversation, must be shown. Miles v. Andrews, 153 Ill. 262, 38 N. E. 644; Swing v. Walker, 27 Pa. Super. Ct. 366, 373. Compare Godair v. Ham Natl. Bank, 225 Ill. 572, 80 N. E. 407; also Kansas City Star Co. v. Standard Warehouse (Mo. App.) 99 S. W. 765. In the latter case the court went to the extreme limit and held that a person called to the 'phone by one who purports to be X. could give the conversation as though with X. A deposition of a party taken before trial may be proved as an admission, even though it cannot be used

An illustration of an admission of the latter kind, to wit, the indirect admission, may be found in the following:

A. sues X. for damage done by X.'s cattle to A.'s crop, and for the purpose of showing an admission on the part of X. that his cattle had caused the damage A. offers the testimony of a witness to the effect that X. had told witness that he had offered A. a certain amount of money to cover the damage. From such statement an inference naturally arises that X.'s cattle did do the damage.[4]

That the defendant in the illustration just used made the statement that he had offered the plaintiff something to cover his damage, while not equivalent to a direct admission that the cattle caused the damage, is, nevertheless, very nearly so. An illustration of an admission somewhat further removed in character from a direct admission is found in a case where A. sued X. for the loss of his sheep, charging that X.'s dog had killed them, and as proof of the fact of the killing, which was the main fact in issue, offered evidence that X. had killed his dog, and at the time remarked that it would kill no more sheep.[5]

as a deposition on account of the presence of the party in court. Gutterson v. Morse, 58 N. H. 165. Statements made by a witness in a prior proceeding, to which a party who was also examined as a witness in said prior proceeding assented, may be proved as an admission against the latter in a subsequent suit. Beeckman v. Montgomery, 14 N. J. Eq. 106, 80 Am. Dec. 229. The admission may be in the shape of testimony given by a party to the action on a former trial, Woods v. Gevecke, 28 Iowa, 561; Lorenzana v. Camarillo, 45 Cal. 125; or statements on printed circulars sent out by a corporation of which defendant was in control, Putnam v. Gunning, 162 Mass. 552, 39 N. E. 347; statements in a pleading in the same action, Ferris v. Hard, 135 N. Y. 354, 32 N. E. 129; statements in a pleading in another action, Printup v. Patton, 91 Ga. 422, 18 S. E. 311; Johnson v. Russell, 144 Mass. 409, 11 N. E. 670. The plea of guilty to a criminal charge may be used as an admission in a civil action. Jones v. Cooper, 97 Iowa, 735, 65 N. W. 1000; Hendle v. Geiler (Del. Super. Ct.) 50 Atl. 632. Statements contained in an independent and wholly collateral agreement may be used as an admission. House v. Cessna, 6 Tex. Civ. App. 7, 24 S. W. 962. The fact that the agreement is a void one does not affect the rule. Morrell v. Cawley, 17 Abb. Prac. (N. Y.) 76; Hickey v. Hinsdale, 12 Mich. 99; Reis v. Hellman, 25 Ohio St. 180. So, also, statements in a tax inventory. Hubbard v. Moore, 67 Vt. 532, 32 Atl. 465.

[4] Story v. Nidiffer, 146 Cal. 549, 80 Pac. 692.

[5] Anderson v. Halverson, 126 Iowa, 125, 101 N. W. 781.

A step further from the direct admission is the statement which by omission becomes evidence of some fact. For example, A. sued X. on a note, claiming ownership thereof. X., to prove the plaintiff did not own the note, offered in evidence the statement made by plaintiff and filed with the tax office, purporting to show the plaintiff's personal property; said statement containing no mention of the note sued upon.[6]

When we go still further from the direct admission, we finally reach the field of admissions by conduct, or in what are frequently spoken of as implied admissions, and which are simply circumstantial evidence. In an action by A. against X. to recover damages to A.'s hack by reason of its use by X. during a smallpox epidemic to carry persons to and from the hospital, it appeared that A. had rendered a final bill for the use of the hack and had never made any claim for damage to it. A.'s failure to make a claim for damages at a time when he would naturally do so, to wit, when he was sending a final bill for its use, is a circumstance in the nature of an admission that there was no damage.[7]

An implied admission is proved by introducing testimony as to such conduct as shows an acknowledgment of the truth of the fact in question.[8] There are very few cases of implied admissions, strictly speaking. In most instances, where actions or conduct are introduced as bearing upon the truth of a fact, it is as circumstantial proof of the fact itself, and not as proof of an admission. The term "implied admission" is often used to designate proof of this sort, but really the element of admission is frequently entirely wanting.

[6] Fudge v. Marquell, 164 Ind. 447, 72 N. E. 565, 73 N. E. 895.

[7] Nichols v. City of New Britain, 77 Conn. 695, 60 Atl. 655.

[8] Proctor v. Railroad Co., 154 Mass. 251, 254, 28 N. E. 13. Where suit was brought by a husband against his wife's brother for alienation of the wife's affections, plaintiff introduced evidence showing that the wife gave as her reason for leaving that her brother would not let her alone, that this statement was made in the presence of the brother, and that he did not deny it. His silence under the circumstances was held to be in the nature of an admission. Bathke v. Krassin, 82 Minn. 226, 84 N. W. 796. Also the omission in a tax return of a certain item of personal security operates as an admission that the party did not own the security at the time of the return. Fudge v. Marquell, 164 Ind. 447, 72 N. E. 565, 73 N. E. 895.

Suppose that the fact in issue be whether X., the defendant, called A. a thief, and it is proved by the testimony of M., a witness, that, in a conversation between X., P., and himself, he, M., said to P., "X. called A. a thief," and X. said nothing, but laughed. Here it is a fair inference from X.'s conduct that he approves what M. says, and virtually acknowledges, though not in words, that he used the language imputed to him. It may be said that X.'s conduct leads also to the direct inference that he called A. a thief, as well as to the inference that he admits he used such language. But it seldom happens that, when conduct is relied on as proof of an admission, it does not also serve as circumstantial proof of the fact to a greater or less degree.[9]

Evidential Force of Admissions.

Direct evidence of a fact may come from the parties to the action or from outsiders. If A. and X. are parties to the action, and M. is a third party, and a fact in issue is whether X. called A. a thief, A may testify that X. did call him a thief. M. may so testify, or X. may take the witness stand, and state that such is the fact. Each testifies from his own knowledge, having heard the words said. Each is giving direct evidence of the fact. The evidence of X., however, has either a very much stronger probative force, or something more than a mere probative force. At all events, the statement by X. that he called A. a thief convinces the mind that the matter is settled, and that the case must be decided against X. X.'s statement as to the fact is an admission, and it has both a stronger probative force, and also something beyond a probative force; the former because it comes from one whose interest would be to state the contrary, and the latter because, if he against whom a fact is charged admits it, he cannot complain of injustice if he is treated as though it were true. In the example cited, the admission was a direct admission in court by X. Suppose, however, X., on the witness stand, denies that he called A. a thief; but P., another witness, testifies that he

[9] Proctor v. Railroad Co., 154 Mass. 251, 254, 24 N. E. 13; Morris v. Norton, 75 Fed. 912, 21 C. C. A. 553. Mr. Justice Taft in this case discusses at some length the effect of admissions by silence or acquiescence. See, also, In re Hulett's Estate, 66 Minn. 327, 69 N. W. 31, 34 L. R. A. 384, 61 Am. St. Rep. 419.

heard M. say that X. called A. a thief, and also heard X., on another occasion, say that he had called A. a thief; what is the result? P.'s testimony as to what M. said is inadmissible, because it is hearsay.[10] P.'s testimony as to what he heard X. say is, however, admissible. It is, also, hearsay. If it be the lack of the sanctity of the oath which renders M.'s mere statement of a fact inadmissible when repeated in court by P., then, perhaps, the guaranty of truth which lies in the statement, being against interest when made by X., is sufficient to make up for this. It is likely, however, that the probative or evidentiary quality of the statement is secondary to the other element mentioned, which may be called the "estoppel element," and that this is the real reason why it is admissible.[11]

In fact, the "against interest" element, so far as it relates to the time of the making of the admission (this element is, of course, always present as relating to the time of trial; otherwise, there would be no attempt by an adversary to introduce evidence of the admission), is sometimes wholly absent, and the admission may have been made in the interest of the party at the time it was made.[12]

ADMISSIBILITY.

66. Admissions of parties to the action are always admissible. In certain cases and under certain circumstances, admissions of persons other than parties are admissible.

Admissions made by parties to the action may be proved in evidence for the reasons which have been somewhat fully

[10] Post, p. 253.

[11] 1 Greenl. Ev. § 169 et seq.

[12] Nichols v. City of New Britain, 77 Conn. 695, 60 Atl. 655, well illustrates this. Ante, p. 122. See, also, Fudge v. Marquell, 164 Ind. 447, 72 N. E. 565, 73 N. E. 895; Wigmore, Ev. § 1048.

stated.[18] One cannot with impunity take a position in the trial of an action inconsistent with the previous position taken by him, and accordingly any acts or statements made by him which show a different attitude or position from that which he has taken in the action are admissible. As has already been stated, it is difficult to say just how far the doctrine of estoppel is responsible for this rule as to admissions of parties. In the case of admissions of persons not parties to the suit, the doctrine of estoppel plays no part; but admissibility of statements rests solely upon the fact that they have been made against the interests of the party making them, and that that interest is identified with the interest of the party to the suit against whom they are sought to be used.

Identity of Interest the Test of Admissibility.

It is sometimes a question of some difficulty to determine just what will be sufficient identity of interest to render such statements admissible. The cases have mainly turned upon this point. Certain rules have become established as to identity of interest, and may be easily applied. Many other cases arise which cannot be brought under any certain rule, but must depend largely upon the facts as to identity of interest, as they are brought out at the trial. In either case the authority should clearly appear before the statement of one should be considered binding as against another. Bare statements by an agent, unaccompanied by any acts, and not in connection with the doing of his principal's business, would, perhaps, never bind the principal, unless it were shown the principal directed the particular statement to be made. In most cases the statements of an agent which are admissible are connected with acts in such a way as to be admissible upon another ground, to wit, as a part of the res gestæ.

[18] A statement, to be receivable as an admission, must be traced to the party. While it is not necessary that the witness testifying to the admission should have known the name of the party, it must appear satisfactorily from the evidence introduced that the person whom witness heard make the statement was the party. Laidlaw v. Sage, 2 App. Div. 375, 37 N. Y. Supp. 770.

SAME—ADMISSIONS OF PARTIES.

67. The admissions of a party are not open to objections to which other parol evidence may be open.

For example, the admission of a party is not subject to the "best evidence" rule. In an action by A. against X. for prosecuting a suit contrary to an agreement, to prove the prosecution of the suit by X., A. offered admissions by X. of the obtaining of the judgment and issue of execution. They were objected to, on the ground that they were not the best evidence, and that a certified copy of the judgment should be produced. Fletcher, J., says: "This is a case of the admission of a party, and the admission of a party stands on distinct grounds. The admissions of a party are not open to the same objection which belongs to parol evidence from other sources. A party's own statements and admissions are, in all cases, admissible in evidence against him, though such statements and admissions may involve what must necessarily be contained in some writing, deed, or record. Thus the statements of a party that certain land had been conveyed might be admitted, though the conveyance must be by deed recorded. The general principle as to the production of written evidence as the best evidence does not apply to the admissions of parties, as what a party admits against himself may reasonably be taken to be true." [14]

68. Statements contained in a pleading may in general be used against the party putting in the pleading.

The principles under which statements contained in a pleading or other formal presentation made in the progress of a judicial proceeding are admissible are no different from those which govern the use in evidence of admissions generally.

The first requisite is that the statement shall be proved to be that of the party against whom it is sought to be used as an admission. This is commonly no difficult matter, as the plead-

[14] Smith v. Palmer (1850) 6 Cush. (Mass.) 513, 521. See, also, Slaterie v. Pooley, 6 Mees. & W. 664; Loomis v. Wadhams, 8 Gray (Mass.) 557.

ing is usually either signed or sworn to by the party, or is of such a formal character as to imply its being put forth with his knowledge and by his direction.

Where pleadings or other statements in a suit are of so informal a character as not to involve knowledge of their substance on the part of the person on whose behalf they are put in, then they must be connected by proof with the party before they can be used.[15]

It sometimes happens that a pleading will contain a formal admission of a fact alleged by the opposite party for the purpose of a plea or defense of justification. Such an admission, being for a particular purpose, cannot be availed of against the party making it, unless he has the opportunity to accomplish such purpose. Such a case is found where, in an action for slander, the defendant alleges in his answer both the defense of general denial and of justification, and then, upon the trial, being compelled to elect between the two defenses, chooses that of general denial. As the defendant will under such circumstances be unable to prove the truth of the slanderous words, his admission in the answer of the speaking of them, made solely for the purposes of the defense, cannot be used against him.[16]

Admissions contained in a pleading, which have been subsequently displaced by an amended pleading, have been differently treated in different jurisdictions. Upon principle there would seem to be no good reason why a fact stated by a party in an original pleading should not be used in evidence against him. As in the case of any other admission, he would always have the opportunity to explain or qualify such statement of fact, if it had been made mistakenly or inadvertently, and is not in accordance with the facts as he in the later pleading alleges them. This is the view taken in several jurisdictions.[17] But in other jurisdictions it has been held that the

[15] Dennie v. Williams, 135 Mass. 28; Burns v. Maltby, 43 Minn. 161, 45 N. W. 3; Combs v. Hodge, 21 How. (U. S.) 397, 16 L. Ed. 115; International & G. N. R. Co. v. Mulliken, 10 Tex. Civ. App. 663, 32 S. W. 152.

[16] Lane v. Bryant, 100 Ky. 138, 37 S. W. 584, 36 L. R. A. 709.

[17] Ryan v. Dutton (Tex. Civ. App.) 38 S. W. 546; Ludwig v. Blackshere, 102 Iowa, 366, 71 N. W. 356.

original pleading no longer binds the party and that it cannot be used against him as an admission.[18]

The statements contained in a pleading may be such as suggest or require an inference as to some material fact of the case of the opponent, or they may be direct admissions of such material facts. In either case, to make use of them before the jury, it is customary to introduce the pleading, or the part of it, sought to be used in evidence. A pleading is always in the case as a part of the record, but it has an additional evidential character, if introduced in evidence.[19]

Statements in the nature of admissions contained in a request to charge are equally available as proof.[20]

SAME—ADMISSIONS OF THIRD PERSONS.

69. The admissions of a third person, when material, are admissible—

(a) When the interest of such person is identified with that of a party to the suit.

(b) When the admissions were made actually or constructively by the authority of a party to the suit.

70. The question of identity of interest is really one of substantive law, and does not belong to the subject of evidence.

Whether one person stands in such a relation to another as to make his statements and acts binding upon him is nothing with which evidence concerns itself, except in an incidental way. If such a relation does exist, then the law of evidence will determine what acts and what statements may be received, and what will be excluded. The existence of the relation, however, is determined by some rule in the law of real property, bills and notes, persons, the criminal law, or whatever branch the particular subject under consideration may belong to. A few of the cases where it has been held that there was sufficient identity of interest to permit the use of admissions

[18] So. Pac. Co. v. Wellington (Tex. Civ. App.) 36 S. W. 1114; Miles v. Woodward, 115 Cal. 308, 46 Pac. 1076.

[19] Palmer Transfer Co. v. Eaves, 85 S. W. 750, 27 Ky. Law Rep. 573.

[20] Pitcairn v. Philip Hess Co., 113 F. 492, 51 C. C. A. 323.

made by a person not a party to the suit against a party to the suit may be given. The identity of interest referred to may relate either to the subject-matter of the suit, or may be dependent upon interest outside of the suit. If the question be as to the title to a piece of property, there may be an identity of interest in the property itself. For example, a previous owner, who has held title to the same land, is considered to have had such an interest in it that statements made by him respecting the title are admissible against a subsequent grantee. Here, to be sure, there is no identity of interest at the time of the suit, and there is very little reason for the principle which allows such statements to be introduced. There is, of course, a certain guaranty for their truth, in the fact that a man is not likely to depreciate his own title; but, were the law not well settled, it is doubtful if the courts would now establish it in the same way.[21]

71. A former owner of land is so identified in interest with a subsequent owner, holding under the same title, that his admissions respecting the title, made while in possession and vested with title, are receivable in evidence.

This rule is based on the theory that the self-interest involved in the ownership of title is a sufficient guaranty for the truthfulness of statements against interest made by an owner.[22]

[21] In Paige v. Cagwin (1843) 7 Hill (N. Y.) 361, it is said: "I admit that there is no solid distinction in principle between the cases referred to by the learned judge, but I by no means admit that the rule as applicable to personal estate should be altered. On the contrary, it appears to be an anomaly in our law if, by the rules of evidence, titles to real estate can be made to depend upon the mere declaration of a prior owner, when every contract for the sale of land is required to be in writing, and title can only be conveyed by deed. There would, in my judgment, be much more propriety in excluding such declarations as affecting real estate than in admitting them as to personal property. But I do not concede that such declarations are now admissible to affect the titles to land, although they may be admitted to explain the character of possession." See, also, Emmet v. Perry, 100 Me. 139, 60 Atl. 872; Dibble v. Cole, 102 App. Div. 229, 92 N. Y. Supp. 938.

[22] Long v. Long, 19 Ill. App. 383. The line of admissibility of declarations of this sort is clearly drawn by the court in this case. The con-

It is imperative that the statements be made while the prior owner is vested with the title. If made after the title has been disposed of, the guaranty of truthfulness is lacking, and it is universally held such statements are inadmissible.[23] The admissibility of statements of this sort is not affected by the fact that the person making them is alive and in court.[24] This is not one of those cases where the admissibility is dependent on the decease or inaccessibility of the witness. It quite frequently happens that the person whose declaration is offered is dead, and from this circumstance has sometimes arisen a misconception of the rule, the statements being classed with those under the exception to the hearsay rule relating to declarations of deceased persons. They more properly belong under the class of admissions.[25]

test was between the heirs of the grantor and a grantee. The declarations were made after the grantor had parted with title, and were introduced on behalf of the grantee. The court say (page 389): "While the statements of a grantor made after conveyance are inadmissible as against the grantee, they would be proper evidence against the heir of the grantor claiming adversely to the grantee." Spaulding v. Hallenbeck, 35 N. Y. 204; Gratz v. Beates, 45 Pa. 495; Baucum v. George, 65 Ala. 259.

[23] Fall v. Fall, 100 Me. 98, 60 Atl. 718; Fyffe v. Fyffe, 106 Ill. 646; Stribling v. Brougher, 79 Ind. 328; Monroe v. Napier, 52 Ga. 385; Dorr v. School Dist. No. 26, 40 Ark. 237; Matteson v. Hartmann, 91 Wis. 485, 65 N. W. 58; Bullock v. Smith, 72 Tex. 545, 10 S. W. 687. The fact that the grantor, at the time of making the admission, owned adjoining land held by same title as the lands conveyed to the grantee, will not make it admissible against the grantee, Hills v. Ludwig, 46 Ohio St. 373, 24 N. E. 596; nor will the fact that the grantor retained possession of the real estate, Emmons v. Barton, 109 Cal. 662. 42 Pac. 303.

[24] In an action by A. against X. for trespass for breaking and entering his close, called "Scorhill," X. called, to prove that Scorhill was a part of common lands, the son of M. M. formerly owned the estate now held by the plaintiff; was alive and in court. The son testified to admissions of his father that he had no right in Scorhill. The court say (Lord Denman): "We think they are receivable on

[25] Paige v. Cagwin, supra; Butler v. Millett, 47 Me. 492; Sargeant v. Sargeant, 18 Vt. 371; Owings v. Low, 5 Gill & J. (Md.) 134, 145; Many v. Jagger, 1 Blatchf. (U. S.) 372, Fed. Cas. No. 9,055; Benson v. Lundy, 52 Iowa, 265, 3 N. W. 149; Randegger v. Ehrhardt, 51 Ill. 101; Pier v. Duff, 63 Pa. 59; Garrahy v. Green, 32 Tex. 202. But see Smith v. Boyer, 29 Neb. 76, 45 N. W. 265, 26 Am. St. Rep. 373.

A mortgagor in possession is held to be sufficiently identified with a subsequent owner who holds title under a foreclosure of the mortgage to render statements made by him as to the title admissible, although the position of the subsequent owner is that of a holder by a paramount title.[26] In the case of a corporation holding title, it is held that admissions of the president are subject to the rule, and may be used against a subsequent owner.[27]

A widow in possession of land under her dower right cannot by her admission affect the title of the children or a purchaser claiming under them.[28]

It is quite generally held that an admission by a predecessor in title is not receivable in evidence to contradict a good record title.[29]

§ 72. The prevailing doctrine in respect to personal property is that declarations by a prior owner while in possession, vested with title, are admissible.

The courts generally have made no distinction between real and personal property in the application of the doctrine of

the ground of identity of interest. The fact of his being alive at the time of the trial, when, perhaps, his memory of facts was impaired, and when his interest was not the same, does not, in our opinion, affect the admissibility of those declarations which he formerly made on the subject of his own rights." Woolway v. Rowe, 1 Adol. & E. 114.

[26] Flagg v. Mason, 141 Mass. 64, 6 N. E. 702; Dawson v. Town of Orange, 78 Conn. 96, 61 Atl. 101. Contra, Merkle v. Beidleman, 165 N. Y. 21, 58 N. E. 757.

In Walsh v. Wheelwright, 96 Me. 174, 52 Atl. 649, the declarations of a tenant, admitting that the plaintiff was the true owner, were received in evidence in an action against one claiming through the tenant's landlord. The landlord had foreclosed a mortgage, but had taken possession only through the tenant. While the declarations were admitted, on the theory of identity between the tenant and the defendant, may they not also have been admissible as original evidence, showing the character of the possession? See note on this case, in 16 Harvard Law Rev. 216.

[27] Holmes v. Turner's Falls Co., 150 Mass. 535, 544, 23 N. E. 305, 6 L. R. A. 283.

[28] Maraman v. Troutman (Ky.) 71 S. W. 861.

[29] Gibney v. Marchay, 34 N. Y. 301; Phillips v. Laughlin, 99 Me. 26, 58 Atl. 64, 105 Am. St. Rep. 253.

identity of interest. Where title to chattels or choses in action is in question, declarations in disparagement thereof by a prior owner while holding title have usually been admitted;[30] but, where title has been parted with, they will not be received.[31] Even where the assignor is a nominal plaintiff, it is held his statements made after he transferred his interest to the assignee are inadmissible.[32]

In New York state the courts have refused to extend the doctrine to personal property, and exclude such statements whether made before or after transfer of title,[33] except as against an assignee for the benefit of creditors, where they are admitted.[34] Statements made by the vendor, or in fact any other person, in actual possession, as to the character of his possession, are admissible;[35] but here we get into the field of res gestæ, which will be treated of elsewhere.

73. A prior holder of a bill or note is not regarded as so identified in interest with a subsequent holder as to render his declarations admissible in an action against such subsequent holder.

The disposition has been rather to limit than to extend the doctrine of admissibility of statements on the ground of identity of interest. Even in jurisdictions where such statements are received in respect to chattels, the rule is not extended to negotiable paper, and the general rule in respect to negotiable paper excludes this class of evidence.[36]

[30] Gullett v. Otey, 19 Ill. App. 182; Benson v. Lundv, 52 Iowa, 265, 3 N. W. 149; Piedmont Sav. Bank v. Levy, 138 N. C. 274, 50 S. E. 657.

[31] Parry v. Libbey, 166 Mass. 112, 44 N. E. 124; Pier v. Duff, 63 Pa. 59; Thornton v. Tandy, 39 Tex. 544. In the case of fraudulent assignments, it has in some jurisdictions been held that declarations made by the assignee after the assignment will be admitted as corroboratory of other evidence to prove the fraud. Smith v. Boyer, 29 Neb. 76, 45 N. W. 265, 26 Am. St. Rep. 373.

[32] Butler v. Millett, 47 Me. 492; Sargeant v. Sargeant, 18 Vt. 371.

[33] Flannery v. Van Tassel, 127 N. Y. 631, 27 N. E. 393.

[34] Humphrey v. Smith, 7 App. Div. 442, 39 N. Y. Supp. 1055.

[35] Smith v. Boyer, 29 Neb. 76, 45 N. W. 265, 26 Am. St. Rep. 373.

[36] Dodge v. Freedman's Sav. & Trust Co., 93 U. S. 379, 23 L. Ed. 920; Shober v. Jack, 3 Mont. 351; Paige v. Cagwin (1843) 7 Hill (N. Y.) 361; Fitch v. Chapman, 10 Conn. 8.

The parties may, by reason of their relation, as where the one stands in a representative capacity to the other, be so identified as to render the declarations of the prior holder good against the representative; but the mere fact of the one being a predecessor of the other is not sufficient.[87]

74. In some jurisdictions it has been held that admissions made by one of two persons jointly liable are receivable against the other.

75. It is conceived that neither joint liability nor joint interest in the result of the suit or in the subject-matter of it is sufficient in itself to render admissions made by one binding upon another.

[87] In Paige v. Cagwin, supra, A. brought an action against X. on a promissory note which he had received from M. after it became due. X. offered a certain declaration made by M. that there was nothing due on the note. Lott, Senator, says: "I do not deem it necessary to refer particularly to the other cases cited by the plaintiff in error. It will be found on an examination of most of them that they do not sustain the doctrine that the declarations of a prior holder of a note or vendor of a chattel are admissible in evidence as against a subsequent owner, who acquired title for a valuable consideration. It may, I think, be laid down as a general proposition that the cases in which such evidence has been held admissible are those only where the declarations were made by a party really in interest, or by one through whom the plaintiff claimed as a privy by representation, as in cases of bankruptcy, death, and others of a similar character. * * * It is insisted, however, that the indorsee of a note overdue takes it subject to all the equities existing between the original parties at the time of the indorsement, and that, if the admissions made by a prior holder are excluded, then the other party is prejudiced. It is true that the note in such case is subject to the same defense in the hands of the indorsee, as when it was in the hands of the indorser: but it by no means follows that the mere declarations of such indorser can affect the right of the indorsee. The means of providing a defense may be affected, but the right to it is not impaired. The defense still exists, but it must be established by testimony, and not by mere declarations." In Shober v. Jack (1879) 3 Mont. 351, Knowles, J., says: "The first point [the admissibility of declarations of the prior holder of note] is decided in the case of Dodge v. Freedman's Sav. & Trust Co., 93 U. S. 379, 23 L. Ed. 920. In this case it is held that the declarations or admissions of the indorser or assignor of a note, although indorsed or assigned after due, as to the payment thereof, cannot be introduced in evidence against a subsequent owner and holder thereof in an action thereon."

The subject of the effect of admissions made by one of several parties to a suit similarly situated with respect to its subject-matter is one upon which the authorities are not in a very satisfactory condition. An idea has prevailed that a joint liability operated to make the admissions of any one of the obligors binding upon all.[38] Out of this have grown decisions applying the principle under certain circumstances. But, as the idea never was founded on any valid reason, it did not spread far through the decisions; and, though the frequency with which it has been pressed as the ground for the admissibility of declarations has given it prominence in the cases, it is a prominence of denial, rather than of affirmance. Where it has ostensibly prevailed, it will usually be found that some other element is present than mere joint liability.[39] The cases where it has been denied application are legion.[40]

[38] Barrick v. Austin, 21 Barb. (N. Y.) 241. The principle on which this case was decided was not followed in Wallis v. Randall, 81 N. Y. 164, where the court said, in effect, that agency or some other representative relation must exist in order to render the statements of one joint obligor binding upon another. In Bank of U. S. v. Lyman, 20 Vt. 666, Fed. Cas. No. 924, language in support of the idea is used, but the admissions were receivable also on the ground of agency, and the court so state. In Tyler v. Ulmer, 12 Mass. 163, A. sued X., a sheriff, for default on the part of M., a deputy sheriff, in satisfying an execution. To show the default, A. offered letters and statements made by M. as to the property on which execution should have been levied. It was held that they were admissible against X., since M. was practically, though not nominally, the defendant, being the one ultimately liable for any damages recovered. In Dickenson v. Clark, 5 W. Va. 280, another case frequently cited in support of the principle, there is only a dictum, the statement being in fact rejected, because the joint interest was not proved by outside evidence. See, also, Bacon v. Green, 36 Fla. 325, 343, 18 South. 870.

[39] Wallis v. Randall, 81 N. Y. 164; Rapier v. Insurance Co., 57 Ala. 100; Bank of U. S. v. Lyman, 20 Vt. 666, Fed. Cas. No. 924; Shirk v. Brookfield, 77 App. Div. 295, 79 N. Y. Supp. 225.

[40] Co-legatees or co-devisees, though both parties to a suit in which the validity of the will is attacked, are not held to be so connected by joint interest in the result as to render admissions by one binding upon the other. Shaver v. McCarthy, 110 Pa. 339, 348, 5 Atl. 614. Nor is the fact that there is an allegation of conspiracy between the two legatees sufficient, in the absence of any evidence of conspiracy, to render the admission of one binding upon the other. Wood v. Carpenter, 166 Mo. 465, 66 S. W. 172. Their interests are several, not

A principle has been laid down, which seems founded in common sense, to the effect that, when the right of a complainant as against one defendant is only prevented from being complete by some question between the plaintiff and the second defendant, the admissions of the second defendant as to such question will be received.[41]

It has been cited as the principle upon which the bar of the statute of limitations is removed as against several joint obligors;[42] but there is something besides a rule of evidence as to

joint. In Kentucky admissions of this kind are admitted as against the devisee making them, and as having the effect of circumstantial evidence against co-devisees. Milton v. Hunter, 13 Bush (Ky.) 163. And see Gibson v. Sutton (Ky.) 70 S. W. 188. Copartners, after the dissolution of the firm, are not so identified in interest with respect to partnership rights and liabilities that the admissions of one will bind the other. This is apparently on the ground that the representative or agency element is lacking. Baker v. Stackpoole, 9 Cow. (N. Y.) 420, 433, 18 Am. Dec. 508; Hogg v. Orgill, 34 Pa. 344; Winslow v. Newlan, 45 Ill. 145; Rose v. Gunn, 79 Ala. 411, 414; First Nat. Bank v. Strait, 65 Minn. 162, 67 N. W. 987; Hamilton v. Summers, 12 B. Mon. (Ky.) 11, 14, 54 Am. Dec. 509; Conery v. Hayes, 19 La. Ann. 325; Dowzelot v. Rawlings, 58 Mo. 75; Peoria Scrap Iron Co. v. Cohen & Co., 113 Ill. App. 30; Naul v. Naul, 75 App. Div. 292, 78 N. Y. Supp. 101; Belding v. Archer, 131 N. C. 287, 42 S. E. 800. The rule is contra in several states. It is based on the theory that "there is a community of interest in relation to all partnership transactions, which will continue so long as they remain unadjusted, and from the liabilities of which neither partner can escape." Parker v. Merrill, 6 Greenl. (Me.) 41, 43. To the same effect are Gay v. Bowen, 8 Metc. (Mass.) 100; Rich v. Flanders, 39 N. H. 304, 338; Loomis v. Loomis, 26 Vt. 198. Statements by one shareowner in a vessel as to the use of lumber, the value of which was sued for, are not admissible against another shareowner. Dean v. Ross, 105 Cal. 227, 38 Pac. 912.

[41] Langley v. Andrews, 142 Ala. 665, 38 South. 238. In this case the answer of the second defendant was used to prove title in plaintiff to a mortgage which had been assigned to him by the said defendant.

The same principle, applied in the converse, is found in Cornelissen v. Ort, 132 Mich. 294, 93 N. W. 617, where, in a suit against three attorneys for negligence in failing to take an appeal, the statement of one of them, in an affidavit upon a motion for extension of time to perfect the appeal, it was held, could be used in favor of the others; the statement being to the effect that the neglect was wholly his fault, and there being also an affidavit of plaintiff on the same motion that he had left the matter entirely to such attorney.

[42] Bissell v. Adams, 35 Conn. 299.

the use of admissions which is involved here. There is a doctrine of substantive law, either common or statutory. That such is the fact is seen in cases where, through collusion or fraud of some sort, it is inequitable that the rule should be applied. The courts in such cases do not hesitate to deny any effect to the admission, even though received in evidence.[43]

Where one not a party to the record is the real party in interest, his admissions are held receivable; but this is not an application of the idea as to joint obligors or persons jointly interested. It is rather on the theory that "the party in interest cannot be permitted to assert successfully, through the intervention of an agent and trustee, a claim which he would be estopped from asserting if the suit were brought in his own name." [44] The joint interest between the assured and the beneficiary under a policy of insurance is not held sufficient to make the admissions of the one binding upon the other.[45]

Nor is the relationship between sister and brother, where the brother has died and the sister is his heir, sufficient to justify receiving the admissions of the sister made prior to the

[43] Colt v. Tracy, 8 Conn. 268, 277, 20 Am. Dec. 110. Here the court, not to seem to repudiate the rule that the admissions of one joint obligor are receivable in evidence against another, drew a peculiar distinction between receiving statements in evidence and giving full legal effect to them for all purposes, saying that the latter will not be done if it will work an injustice. In New York, in the absence of any element of agency, the doctrine is that an admission of one joint debtor will not bind the other so as to remove the bar of the statute. Van Keuren v. Parmelee, 2 N. Y. 523, 525, 51 Am. Dec. 322; Murdock v. Waterman, 145 N. Y. 55, 63, 39 N. E. 829, 27 L. R. A. 418.

[44] Kendall v. Lawrence, 22 Pick. (Mass.) 540; Bigelow v. Foss, 59 Me. 162, in which admissions of a beneficiary were received against the trustee suing. The fact as to the interest must clearly appear before the admissions will be received. May v. Taylor, 6 Man. & G. 261; Tyler v. Ulmer, 12 Mass. 163, in which admissions of a deputy were allowed against the sheriff being sued; Pike v. Wiggin, 8 N. H. 356, where admissions of a creditor were allowed against a sheriff suing a person in whose hands attached property was left.

[45] Goodwin v. Society, 97 Iowa, 226, 66 N. W. 157, 32 L. R. A. 473, 59 Am. St. Rep. 411; Thies v. Insurance Co., 13 Tex. Civ. App. 280, 35 S. W. 676. It was held, however, that, where the assured retained the power to change beneficiary, there his admission of forfeiture was receivable against the beneficiary. Fidelity Mut. Life Ass'n v. Winn, 96 Tenn. 224, 33 S. W. 1045.

death of the brother as to his interest in a partnership.[46] Nor does the fact that a husband and wife are joined as defendants in an action against them both make the declarations of the wife binding as admissions against the husband, where she is not shown to have been authorized by him to make them.[47]

In this particular case it appeared that the wife was improperly joined; but it does not seem that there would be any different conclusion reached, had both properly been defendants.

76. When the relation of principal and agent is shown to exist, the statements of the agent made within the scope of his authority are admissible against the principal.

The admission of an agent, if made concerning his principal's business and by authority of his principal, is nothing more nor less than the admission of the principal; and the fact of its being spoken by the agent does not change it any more than if the principal had employed the instrumentality of a pencil and paper. Statements made under such circumstances are admissible against the principal. They are in legal effect the statements of the principal, and therefore their admissibility rests upon the rule as to admissions of parties to the suit.[48]

Dependent upon this principle of agency are the rules with respect to the admissions of a husband as against the wife, or vice versa;[49] by attorneys as against clients;[50] by partners

[46] Rapp v. Becker, 4 Ohio Cir. Ct. Rep. (N. S.) 139

[47] Horan v. Byrnes, 70 N. H. 531, 49 Atl. 569.

[48] The question as to when such a relation exists as to render admissions binding on the ground of agency is often one of considerable difficulty. It is not, however, a question of evidence. As to the admissions of agents generally, see West Jersey Traction Co. v. Camden Horse R. Co., 53 N. J. Eq. 163, 168, 35 Atl. 49; Idaho Forwarding Co. v. Firemen's Fund Ins. Co., 8 Utah, 41, 29 Pac. 826, 17 L. R. A. 586.

[49] Riley v. Suydam, 4 Barb. (N. Y.) 222; Harless v. Harless, 144 Ind. 196, 41 N. E. 592; Walker v. Insurance Co., 1 Mo. App. Rep. 478. Neither part payment nor a new acknowledgment of indebtedness made by a wife will operate against the husband to revive a claim barred by the statute of limitations, unless agency sufficient for this purpose is shown. Butler v. Price, 115 Mass. 578. The admissions of

[50] See note 50 on following page.

as against partners;[51] by trustee as against beneficiary;[52] by employé as against employer;[53] by corporate officers

the wife were excluded as against her husband in Rose v. Chapman, 44 Mich. 312, 6 N. W. 681, because "the purpose here was to use her admissions against her husband as binding him, although not confined to acts of agency"; also in Goodrich v. Tracy, 43 Vt. 314, 5 Am. Rep. 281. And, where husband and wife sued jointly for value of services of wife, the admissions of the wife were not allowed as against the husband, it being held that the cause of action belonged to him. Jordan v. Hubbard, 26 Ala. 433.

[50] An admission made by an attorney as evidence has no greater force than one made by any other duly authorized agent. Where made in the course of the trial, it has more than an evidentiary force, and is conclusive upon the party. See Marsh v. Mitchell, 26 N. J. Eq. 497, 501, and Haas v. Society, 80 Ill. 248. Nor does the fact that it is made after the trial make any difference. The Harry, 9 Ben. (U. S.) 524, Fed. Cas. No. 6,147. But when made outside of the record, and introduced as evidence, it has only a prima facie effect. The distinction was recognized in Perry v. Manufacturing Co., 40 Conn. 313, 317. The admission of an attorney is not receivable unless made with reference to a matter in which he had authority to represent his client. Fletcher v. Railway Co., 109 Mich. 363, 67 N. W. 330; Pickert v. Hair, 146 Mass. 1, 5, 15 N. E. 79; Treadway v. Railroad Co., 40 Iowa, 526.

Where a town had paid damages for injuries and brought action against a street railway company for indemnity, evidence was offered that an attorney who had been employed to look after the railway company's interests had said, during the progress of the action against the town and after final judgment, in response to an inquiry as to what should be done: "Pay it, and then I will talk to you later about it." It was held inadmissible as beyond the attorney's authority. Town of Waterbury v. Waterbury Traction Co., 74 Conn. 152, 50 Atl. 3. But when so made it is admissible. Loomis v. Railroad Co., 159 Mass. 39, 44, 34 N. E. 82. The incidental statement by an attorney of a fact as he expects to prove it, made in his opening, is not an admission which can be relied on by the other side. Lake Erie & W. R. Co. v. Rooker, 13 Ind. App. 600, 41 N. E. 470. But see, Oscanyan v. Arms Co., 103 U. S. 261, 26 L. Ed. 539, where verdict was directed in the opening statement of counsel.

[51] Grunenberg v. Smith, 58 Ill. App. 281.

[52] Knorr v. Raymond, 73 Ga. 749; Northrup v. Sullivan, 47 La. Ann. 715, 17 South. 259; Helm v. Steele, 22 Tenn. 472. The real test of the admissibility is that of authority. The circumstances under which the admission is made usually show this. If they do not, the statement of the trustee is not admissible merely because he is trustee. Eltelgeorge v. Mut. House Bldg. Ass'n, 69 Mo. 52; Bragg v. Geddes, 93 Ill. 39.

[53] In a suit to recover damages for the loss of cattle while in transit on defendant's road, a statement, made by the engineer while the

against the corporation.[54] Under this head, also, come statements made by third persons to whom parties to the suit have referred others for information; the agency here being for the purpose of making the statements.[55] Statements made about matters other than the particular matter concerning which reference to the third party was made are not admissible.[56] The agency relation necessary to render the statements sought to be introduced admissible must be proved by

cattle were being loaded, that he would kill them before they reached a certain point, was held admissible. Crawford v. Ry. Co., 56 S. C. 136, 34 S. E. 80.

[54] Choctaw, O. & G. R. Co. v. Rolfe, 76 Ark. 220, 88 S. W. 870; Lynchburg Tel. Co. v. Bokher (Va.) 50 S. E. 148.

In an action for personal injuries against a city, the plaintiff alleging that the defendant was negligent in failing to have the electric current shut off from the circuit on which the plaintiff was working, the plaintiff, for the purpose of proving that the current was not shut off and that for an insufficient reason, offered evidence of a conversation between the chairman of the commission in charge of the lighting and the foreman. The foreman was asked why he did not have the circuit cut off, and replied that it was because "G." was baking bread, to which the chairman replied: "Are you going to burn a man up for a few loaves of bread? Damn G. and his bread." It was held that this was admissible, and was binding upon the city. City of Austin v. Forbis (Tex. Sup.) 89 S. W. 405.

[55] In Chapman v. Twitchell, 37 Me. 59, 58 Am. Dec. 773, the action was by A. against X. for trespass. The trespass depended upon the location of a boundary line which was in dispute. X. introduced evidence that M., in a conversation with A., asked him to show him where the corner of the land was, and A. replied that T. could show where the corner was; that T. accordingly went with M., and pointed out a certain white pine stump as the corner. Upon the question whether this was properly admitted as an admission binding A., the court say (page 62): "The admissions of a third person are receivable in evidence against the party who has expressly referred another to him for information in regard to an uncertain or disputed fact. In such cases the party is bound by the declarations of the person referred to in the same manner and to the same extent as if they were made by himself." To the same effect are Chadsey v. Greene, 24 Conn. 562, 572; Bigler v. Atkins, 21 Wkly. Dig. (N. Y.) 201; Over v. Schiffling, 102 Ind. 191, 26 N. E. 91; Turner v. Yates, 16 How. (U. S.) 14, 28, 14 L. Ed. 824. But it must distinctly appear that the reference to the third party was intended to be authoritative. A mere casual statement, expressing a desire to consult a third party, is not sufficient. Proctor v. Railroad Co., 154 Mass. 251, 28 N. E. 13.

[56] Allen v. Killinger, 8 Wall. (U. S.) 480, 19 L. Ed. 470.

evidence other than the statements of the agent; and, until it is so proved, such statements are inadmissible.[57]

It is noticeable that, in many of the cases where the statements of third persons are admitted as binding upon a party to the suit on the theory of agency, these same statements would be admissible on the other ground of being a part of the res gestæ.[58]

SAME—ADMISSIONS PENDING NEGOTIATIONS FOR COMPROMISE.

77. The fact that a party to a suit made an offer to settle it is not provable as an admission of liability.

78. Statements and declarations made after suit brought, in the course of, or as a part of, negotiations for a compromise, are not receivable as admissions against the party making them, if they are stated to be made without prejudice, or if they are clearly of such nature that the court can see that they would only have been made for the purpose of furthering the negotiations, and on the understanding that they would not be used.

79. The mere fact that an admission is made in the course of negotiations for compromise is not sufficient to exclude it if it relates to a material fact in issue, and was not made under the circumstances mentioned in the preceding paragraph.

The rules of exclusion above stated are founded upon the policy of the law which encourages settlements between litigants. To encourage the greatest freedom of negotiation, the courts have laid it down as a rule that no admission or statement made in the course, and for the sole purpose, of such negotiation, shall affect the litigation, to the prejudice of the party making it; and they have therefore refused to receive such statements as evidence.[59] It must appear, how-

[57] Schoenhofen Brewing Co. v. Wengler, 57 Ill. App. 184; Postal Telegraph Cable Co. v. Brantley, 107 Ala. 683, 18 South. 321; Waller v. Leonard (Tex. Civ. App.) 34 S. W. 799.

[58] See section 210, and cases cited thereunder.

[59] Smith v. Satterlee, 130 N. Y. 677, 29 N. E. 225; White v. Steamship Co., 102 N. Y. 660, 6 N. E. 289; Doyle v. Levy, 89 Hun, 350, 35 N. Y. Supp. 434; Callen v. Rose, 47 Neb. 638, 66 N. W. 639; Galves-

ever, that the statements were stated to be made without prejudice, or that the circumstances surrounding the making of them were such that it was understood they were so made.[60]

It has been held that an offer of money made to induce the withdrawal of a criminal charge is not admissible,[61] though it seems that in such case the reason for the exclusion of the offer is entirely wanting. No consideration of public policy requires the settlement of a criminal case. On the contrary, the interests of the public require vigorous prosecution. There may, however, be a lack of reliability in evidence of an offer to settle a criminal case. Doubtless many such offers have been made, although no guilt exists, merely for the purpose of avoiding the notoriety attached to a public criminal prosecution. In this view an offer of settlement might be said to have little probative force.

There is a distinction, however, between offers of compromise, statements made tentatively in connection therewith, or admissions of facts understood to be made without prejudice, and admissions of material facts in issue made in the course of negotiations, but not under such conditions. The mere fact of the negotiations pending will not be ground for the exclusion of statements of the latter kind.[62]

ton, H. & S. A. Ry. Co. v. Green (Tex. Civ. App.) 35 S. W. 819. On the same principle, an admission made for a special purpose, other than a compromise, will not be received generally against the party making it. Cincinnati, H. & I. R. Co. v. McDougall, 108 Ind. 179, 182, 8 N. E. 571. The rule only extends to offers of compromise of the matters in issue in the suit pending in which the evidence is offered. Stuht v. Sweesy, 48 Neb. 767, 67 N. W. 748; Tennant v. Dudley, 144 N. Y. 504, 39 N. E. 644.

[60] White v. Steamship Co., 102 N. Y. 660, 662, 6 N. E. 289.

[61] Sanders v. State (Ala.) 41 South. 466.

[62] Beaudette v. Gagne, 87 Me. 534, 33 Atl. 23. The language of the decision is (pages 537, 538, 87 Me., and pages 23, 24, 33 Atl.): "The law very wisely excludes the testimony of mere offers of compromise when one against whom a claim is made denies his liability or the extent of it, but, for the purpose of buying his peace, makes an offer of concession or compromise. This should have no effect whatever against him, and therefore, ordinarily, should not be admitted in evidence. The same is, of course, true if a person making a claim against another, for the purpose of preventing litigation, offers to settle for a less sum than he claims to be entitled to. But if, during the negotiations, either makes an admission of a fact material to the is-

CIVIL AND CRIMINAL CASES.

80. There is no distinction between civil and criminal cases in respect to the use of admissions.

"In general, the rules of evidence in criminal and civil cases are the same. Whatever the agent does within the scope of his authority binds his principal, and is deemed his act. It must, indeed, be shown that the agent has the authority, and that the act is within its scope; but that being conceded or proved, either by the course of business or by express authorization, the same conclusion arises in point of law in both cases." [63] It is the same with statements as with acts; given

sue, because it is a fact, such admission, both upon principle and upon authority, may be put in evidence, the same as if made elsewhere and under different circumstances." To the same effect: Rose v. Rose, 112 Cal. 341, 44 Pac. 658; White v. Steamship Co., supra; Hartford Bridge Co. v. Granger, 4 Conn. 142; Akers v. Kirke, 91 Ga. 590, 18 S. E. 366.

[63] Language of Judge Story in U. S. v. Gooding (1827) 12 Wheat. 460, 6 L. Ed. 693. In this case, upon the trial of X., the owner of a ship, for being engaged in the slave trade, the testimony of C. is offered that H., the captain of the ship, promised to C. to engage him as mate for the voyage to Africa for slaves, and offered C., in addition to his wages, five dollars a head for every slave, and said that, in the event of disaster, X. would see the crew paid. Judge Story says: "The argument is that the testimony is not admissible, because, in criminal cases, the declarations of the master of the vessel are not evidence to charge the owner with an offense; and that the doctrine of the binding effect of such declarations by known agents is and ought to be confined to civil cases. We cannot yield to the force of the argument." It is to be noted that the declarations of the master in this particular case were admitted expressly upon the ground that they were a part of the res gestæ, as is shown by the following: "These declarations were connected with acts in furtherance of the objects of the voyage, and within the general scope of his authority as conductor of the enterprise. * * * They were therefore, in the strictest sense, a part of the res gestæ, the necessary explanations attending the attempt to hire. * * * Our opinion of the admissibility of this evidence proceeds upon the ground that these were not the naked declarations of the master, unaccompanied with his acts in that capacity, but declarations coupled with proceedings for the objects of the voyage, and while it was in progress. We give no opinion upon the point whether mere declarations under other circumstances would have been admissible."

the authority, and the statement is binding on the principal. The cases clearly show that the rule as to admissions is not confined to civil cases.

Difficult Questions Arising in Criminal Cases.

A curious question sometimes arises in criminal cases where two persons are jointly charged with the commission of crime. One of the accused may make statements respecting the crime which would be strong evidence as to its commission. How far such statements are admissible against the other who is charged with the same crime must then be determined. In one case, for example, where two parties were tried together for conspiracy to cheat and defraud, the jury disagreed as to one of the accused persons, and found the other one guilty. As a matter of fact, outside of the proof in the case, it was impossible that the one should have been guilty without the other one also having been guilty; yet it is entirely possible that the proof as to one was such that the jury were justified in finding his guilt, whereas, under the rules of evidence, it was insufficient to prove the guilt of the other. But, by a technical rule prevailing in criminal cases, it is held impossible, where the parties are tried together, to find one guilty unless the other is also convicted.[64]

Admissions of One Conspirator Used Against Another.

A rule is also well established that, in cases where conspiracy is charged, the admissions of one of the accused may become, by reason of the other proof in the case, admissible against the other. By themselves, and without other proof, they are not admissible; but, if the proof shows the existence of the conspiracy, statements as to details of the crime charged, made by one of the parties, become admissible against the other. The effect of this rule may be illustrated by supposing that the fact of the commission of the act which is charged as a crime is difficult of proof, but the fact of the conspiracy to commit such an act has been sufficiently proved. To procure a conviction, it is necessary that proof shall reach to both facts. Suppose, now, that the only proof of the former fact con-

[64] Reg. v. Manning (1883) 12 Q. B. Div. 241; Rex v. Cooke, 5 Barn. & C. 538; Reg. v. Thompson, 16 Q. B. 832; O'Connell v. Reg., 11 Clark & F. 155.

sisted of statements in respect to it made by one of the parties. It is clear that since both are shown to have been interested together, and to have set out to commit the act, the statements made by one as to what was done should be received against the other.[65] It must be borne in mind, however, that the fact of the conspiracy is to be proved by evidence entirely outside of the admissions.[66] It is probable that, in all cases of conspiracy where admissions are received, their reception could be explained on the ground that they are a part of the res gestæ.[67]

Other Cases of Joint Crimes.

In cases of a joint crime, such as fornication or adultery, which cannot be committed except by the concurrent act of two parties, the rule is the same as in cases of conspiracy. The

[65] U. S. v. McKee, 3 Dill. (U. S.) 546, Fed. Cas. No. 15,635; Com. v. Waterman, 122 Mass. 43, 59; Dewey v. Moyer, 72 N. Y. 70, 80; Lowe v. Dalrymple, 117 Pa. 564, 568, 12 Atl. 567; State v. Brady, 107 N. C. 822, 831, 12 S. E. 325; Seville v. State, 49 Ohio St. 117, 128, 30 N. E. 621, 15 L. R. A. 516; Travers v. Snyder, 38 Ill. App. 379, 388, Walls v. State, 125 Ind. 400, 25 N. E. 457; State v. Minton, 116 Mo. 605, 22 S. W. 808; Holtz v. State, 76 Wis. 99, 44 N. W. 1107; People v. Brown, 59 Cal. 345, 352. The existence of the conspiracy need only be proved prima facie. Dodge v. Goodell, 16 R. I. 48, 12 Atl. 236. The statements must relate to acts connected with or in furtherance of the conspiracy. New York Guaranty & Indemnity Co. v. Gleason, 78 N. Y. 503; State v. Thibeau, 30 Vt. 100, 107; State v. Flanders, 118 Mo. 227, 236, 23 S. W. 1086; State v. Buchanan, 35 La. Ann. 89; Nicolay v. Mallery, 62 Minn. 119, 64 N. W. 108.

But where one of the alleged conspirators has been acquitted, it has been held that his acts and declarations are no longer provable against another alleged conspirator. Paul v. State, 12 Tex. App. 346. Contra, Musser v. State, 157 Ind. 423, 61 N. E. 1.

[66] In Ormsby v. People, 53 N. Y. 472, it was held that the mere presence of A. with B. and C. in a store while B. and C. committed a theft, and the fact of A. having come with them, and being an acquaintance, were not sufficient to show prima facie a conspiracy with them, so as to render declarations of B. and C. competent against A. Com. v. Waterman, 122 Mass. 43; State v. Daubert, 42 Mo. 239; Brown v. Com., 86 Va. 935, 11 S. E. 799; State v. Brown, 34 S. C. 41, 46, 12 S. E. 662; Territory v. Campbell, 9 Mont. 16, 22 Pac. 121.

[67] This view is taken by Underhill in his recent work on Evidence (page 95). New York Guaranty & Indemnity Co. v. Gleason, 78 N. Y. 503; Nicolay v. Mallery, 62 Minn. 119, 64 N. W. 108; Spies v. People, 122 Ill. 1, 12 N. E. 865, and 17 N. E. 898, 3 Am. St. Rep. 320; Clawson v. State, 14 Ohio St. 234.

furthest the courts have gone is to allow one of the parties to be tried by himself, and convicted, and then judgment is given against that party, because as to him the guilt of the other party is found as well as his own. But when the one has been previously tried and acquitted, or when both are tried together, and the verdict is for one, the other cannot be found guilty.[68] It may happen that the guilt of one of the parties is conclusively proved by the admissions of such party; but it seems the court would not shrink from going to the full length of declaring that in such case, since the admissions would not be good as against the other party, there could be no judgment against either.[69] That the rule referred to is not favored by the courts is seen in the fact that, in civil cases where the same difficulty has arisen, they have refused to follow it, and have said that it was a purely technical rule, and should be confined strictly to the cases in criminal law where it has been applied.[70]

[68] State v. Rinehart (1890) 106 N. C. 787, 11 S. E. 512. Contra, Alonzo v. State, 15 Tex. App. 378, 49 App. Rep. 207; State v. Caldwell, 8 Baxt. (Tenn.) 576.

[69] State v. Rinehart, 106 N. C. 787, 11 S. E. 512. In this case there was held to be sufficient evidence outside of the admissions against the parties to justify conviction; so that while the court stated that, were it not for such evidence, it would have been required to hold that neither party could have been convicted, it was not in fact forced to this position.

[70] Robinson v. Robinson (1858) 1 Swab. & T. 362. In Pomero v. Pomero, London Times, Dec. 20, 1884, Mr. Justice Butt, in charging the jury in a proceeding for divorce, said: "There was a curious feature in this case to which he desired to direct their attention. As the respondent had filed no answer to the petition, it was for the court, and not for the jury, to decide whether she had committed adultery with the co-respondent; and his decision was that she had. But, as the co-respondent had filed an answer denying the adultery with the respondent, it was for the jury to find whether he had committed it or not. Now, it was open to the jury to find that the co-respondent had not committed adultery with the respondent, while the court found that the respondent had committed adultery with the co-respondent. Two such findings would appear to be in complete contradiction; but the contradiction would be more apparent than real. Courts and juries must base their findings on evidence, and what might be in law conclusive evidence against one of the parties charged might be none whatever against the other."

PROOF OF ADMISSIONS.

81. The method of proving admissions is the same as that of proving other facts.

The preliminary examination relating to contradictory statements, which is required in the case of attempted impeachment of a witness by showing that he has made different statements at a previous time, is not necessary in proving the admissions of a party.[71] The fact that the party has, as a witness in his own behalf, sworn to the contrary of the admission, does not change the case. His attention need not be called to the previous admissions which are expected to be proved.[72]

It sometimes happens that an attempt is made to hold as binding the admissions of one party as against another. The subject of when and how this may be done has been fully covered.[73] In such case preliminary proof may be necessary to show the connection between the parties which justifies the admission of statements made by one as against the other. The proof of relationship or authority as between the two parties is not a subject identified with the subject of admissions. What proof will be required or allowed, and how much will be necessary to establish the relationship or authority, are questions entirely apart from the doctrine of admissions.

EFFECT OF ADMISSIONS.

82. The effect of an admission is dependent—
(a) Upon whether or not it is conclusively proved.
(b) In what way it may be explained or limited by the party who has made it.

There is a distinction between an admission and the proof of an admission. Until it is clearly proven that an admission has been made, it can have no effect. Testimony, disputed, or denied, or weakened, in respect to the making of an admission,

[71] Moore v. Crosthwait, 135 Ala. 272, 33 South. 28.

[72] Second Borrowers' & Investors' Bldg. Ass'n v. Cochrane, 103 Ill. App. 29; Dunafin v. Barber (Neb.) 92 N. W. 198.

[73] Ante, p. 128.

cannot, of course, have much effect. Once let it be proved that an admission has been made as to a fact in dispute, and it then becomes a question as to what the testimony of the party making it may disclose. He may say he lied when he made it, or he may so explain the circumstances under which the admission was made that it will have little weight.[74]

If the admission is neither explained nor its force weakened, it may still be a question as to whether it establishes conclusively the fact admitted. It may, for example, be an admission of some fact evidential to the main fact in issue, and as to such main fact there may be much other testimony. It then becomes a matter of weighing the testimony pro and con, balancing the inferences, and deciding whether or not the main fact is sufficiently established. The admission in such case is merely a piece of evidence to be considered with other evidence.

The admission may, on the other hand, relate to the main fact itself, in which case, if conclusively established, it has a strong, in fact almost conclusive, effect, both by reason of its probative force and by reason of the estoppel element heretofore referred to. It is by reason of this element that it may excuse further proof on the part of the party alleging the fact. If, however, the party denying the fact, and against whom the admission has been used, gives such a quantity of other evidence as to make it clear that the fact is otherwise than as admitted, the jury would certainly be justified in disregarding the admission.[75]

[74] Take, for example, the case of an admission in an original answer, which, having been drawn up hurriedly and without consultation with the defendant, has been displaced by an amended answer. The defendant will be permitted to explain the circumstances, and the effect of the admission would be practically destroyed. Schultz v. Culbertson, 125 Wis. 169, 103 N. W. 234.

[75] An admission in a pleading, whether by failure to deny some allegation in the prior pleading or by express terms, has a conclusive effect on the party making it. This is because it is a waiver of proof, and not because it is evidence. A statement in a pleading of a fact which is not in affirmance of a fact alleged in the prior pleading is, however, nothing more than an ordinary admission, the effect of which, if given in evidence against the party making it, may be explained away. Ferris v. Hard, 135 N. Y. 354, 32 N. E. 129; Chamberlain v. Iba, 181 N. Y. 486, 74 N. E. 481.

CHAPTER VII.

CONFESSIONS.

83. Confessions Defined.
84. Admissibility—Must be Voluntary.
85-86. Court to Determine Whether Voluntary.
87. Judicial Compulsion.
88-91. Threats or Inducements.
92. Confessions Under Influence of Liquor.
93. Evidence in Former Proceeding.
94. Whole Confession Must be Introduced.
95. Confessions may be Explained.
96. Evidence Obtained as Result of Confession.
97. Implied Confessions.

CONFESSIONS DEFINED.

83. Confessions are admissions of guilt made by persons ~~accused of crime.~~

The law relating to confessions has been to a considerable extent shaped by statutory provisions, and is not entirely the product of the courts. The effect of the ancient and long-continued practice of extorting confessions by threat or by torture was seen, when more enlightened methods had come into vogue, in the tendency to place little reliance upon confessions as evidence, and to regard their use as dangerous.[1]

[1] The weakness of this class of evidence has been recognized from very early times. In Fost. Crown Law (1763) 243, it is said: "For hasty confessions, made to persons having no authority to examine, are the weakest and most suspicious of all evidence. Proof may be too easily procured. Words are often misreported; whether through ignorance, inattention, or malice, it matters not to the defendant; he is equally affected in either case, and they are extremely liable to misconstruction. And, withal, this evidence is not, in the ordinary course of things, to be disproved by that sort of negative evidence by which the proof of plain facts may be, and often is, confronted." And in 4 Bl. Comm. (8th Ed., 1778) 357, we find the following passage: "Even in cases of felony at the common law, they [confessions] are the weakest and most suspicious of all testimony; ever liable to be obtained by artifice, false hopes, promises of favors, or menaces, seldom remem-

Statutes were accordingly passed prescribing conditions under which they could be taken and used.[2] It seems, however, that, even where not taken in pursuance of the statutes, confessions were allowed to be given in evidence at the common law.[3]

Confessions, as treated of in this chapter, embrace those more or less formal admissions of guilt made by persons charged with crime, which, as proof, go to the main facts in issue, rather than to any single fact or circumstance.[4] Con-

bered accurately or reported with due precision, and incapable in their nature of being disproved by other negative evidence."

[2] The use of confessions against a party was first regulated by statute in 1 & 2 Phil. & M. c. 13, and 2 & 3 Phil. & M. c. 10. In 2 Hale, P. C. 284, 285, we find the following statement: "By the statute of 1 & 2 Phil. & M. c. 13, and 2 & 3 Phil. & M. c. 10, justices of peace and coroners have power to take examinations of the party accused, and informations of the accusers and witnesses (the examinations to be without oath, the informations to be upon oath), and are to put the same in writing, and are to certify the same to the next gaol delivery. These examinations and informations thus taken and returned may be read in evidence against the prisoner if the informer be dead or so sick that he is not able to travel, and oath thereof made; otherwise, not. But then: (1) Oath must be made either by the justice or coroner that took them, or the clerk that wrote them, that they are the true substance of what the informer gave in upon oath, and what the prisoner confessed on his examination. (2) As to the examination of the prisoner, it must be testified that he did it freely, without any menace or undue terror imposed upon him; for I have often known the prisoner disown his confession upon his examination, and hath sometimes been acquitted against such, his confession."

[3] That confessions were allowed to be given in evidence at common law seems to be clear from 2 Hawk. P. C. c. 46, §§ 3, 4. "As to the first particular, viz. where the confession of the defendant or the depositions of others, out of court, may be allowed as evidence, it seems that the confession of the defendant himself, where taken upon an examination of justices of peace, in pursuance of 1 & 2 Phil. & M. c. 13, or of 2 & 3 Phil. & M. c. 10, upon a bailment or commitment for felony, or taken by the common law upon an examination before a secretary of state or other magistrate, for treason or other crimes, not within those statutes, or in discourse with private persons, hath always been allowed to be given in evidence against the party confessing, but not against others."

[4] In Davis v. Com., 95 Ky. 19, 23 S. W. 585, 44 Am. St. Rep. 201, the accused offered in evidence as a confession the statement of one X., made on his deathbed, to the effect that he, X., had killed M., for

fessions, therefore, comprise a small class of admissions,—admissions which come within certain conditions prescribed by statute as to their making, and which in their evidential use are confined to the criminal law.

Reason for Narrow Definition.

The definition of confession here given is somewhat narrower than that usually adopted. It is quite common to include, under the term "confessions," all declarations, statements, or acts on the part of an accused person which may lead to an inference of guilt.[5] In this sense, the word "confession" has no distinction from the word "admission," and is also open to the objection of including a large amount of merely circumstantial evidence, which should properly be classified under neither head. It has already been said that the so-called "implied admissions" from acts or conduct are really original circumstantial evidence, and should not properly be spoken of as admissions. It is equally true that, in criminal cases, implied confessions from conduct are this same sort of evidence, and should not be treated as confessions. As there is, in general, no difference in the use of admissions between criminal and civil cases, the chapter on admissions has sufficiently covered their use in the criminal law, and it remains to deal only with that narrow class of admissions which, by reason of their solemn character and broad effect, are subject to certain rules not applicable to certain admissions.

ADMISSIBILITY—MUST BE VOLUNTARY.

84. Confessions, to be admissible in evidence, must be voluntary. If made as the result of threats or inducements they are inadmissible.

whose murder the accused was on trial, and thus sought to clear himself. It was held that such statement was not admissible as a confession; that the statements of a third person not charged with the crime were not competent in favor of the accused; and that a confession was incompetent evidence except against a person charged with crime, or, in a proper case, against his confederates.

[5] Greenleaf (Ev. § 213), Stephen (Dig. Ev. art. 21), Underhill (Ev. § 88), and many other text writers, use the term "confession" in the broad sense mentioned in the text.

The important element in determining the admissibility of a confession is that it should be voluntary.[6] If it is voluntary within the definition of that term as laid down by the courts, it satisfies the only condition required.

There are many decisions upon the question of what circumstances will render a confession voluntary. In general, it may be said that a confession is voluntary when it is made by the person accused, under such circumstances that his mind is entirely free from any influence, either of fear or favor.[7] The

[6] Baron Parke says, in Reg. v. Baldry (1852) 2 Denison, Crown Cas. 430: "I entirely agree with Lord Chief Baron, and with the view taken by Lord Campbell at the trial. By the law of England, in order to render a confession admissible in evidence, it must be perfectly voluntary; and there is no doubt that any inducement in the nature of a promise, or of a threat held out by a person in authority, vitiates a confession." See, also, People v. Chapleau, 121 N. Y. 266, 24 N. E. 469; Hopt v. People of Utah, 110 U. S. 574, 4 Sup. Ct. 202, 28 L. Ed. 262; Wilson v. U. S., 162 U. S. 613, 16 Sup. Ct. 895, 40 L. Ed. 1090; Robinson v. People, 159 Ill. 115, 42 N. E. 375; Redd v. State, 69 Ala. 255, 259; Self v. State, 6 Baxt. (Tenn.) 244, 255; State v. Carrick, 16 Nev. 120, 130; Bubster v. State, 33 Neb. 663, 50 N. W. 953.

A threat to deliver the accused to a mob will render a confession inadmissible. Whitley v. State, 78 Miss. 235, 28 So. 852. See, also, Bram v. U. S., 168 U. S. 532, 18 Sup. Ct. 183, 42 L. Ed. 568. This case was a peculiar one, in that the words used by a police officer to the accused were conceded by the court to be neither a threat nor a promise, and yet the court reached the conclusion that there was sufficient in them to make any conversation or statement by the accused inadmissible. The testimony of the detective, because of the admission of which the Supreme Court of the United States ordered a new trial, was as follows: "When Mr. Bram came into my office, I said to him: 'Bram, we are trying to unravel this horrible mystery.' I said: 'Your position is rather an awkward one. I have had Brown in this office, and he made a statement that he saw you do the murder.' He said: 'He could not have seen me. Where was he?' I said: 'He states he was at the wheel.' 'Well,' he said, 'he could not see me from there.' I said: 'Now, look here, Bram, I am satisfied that you killed the captain from all I have heard from Mr. Brown. But,' I said, 'some of us here think you could not have done all that crime alone. If you had an accomplice, you should say so, and not have the blame of this horrible crime on your own shoulders.' He said: 'Well, I think, and

[7] In People v. McMahon, 15 N. Y. 384, Judge Selden defined a voluntary confession as one "proceeding from the spontaneous suggestion of the party's own mind, free from the influence of any extraneous disturbing cause."

important quality of a confession is that it be spontaneous. Any circumstances, whether in the physical surroundings of the accused or in statements made to him, which tend to put him in a position where there is any inducement for him to accuse himself, destroy the spontaneousness of the confession, and make it valueless. While it would seem highly improbable that a person accused of crime would make a false confession, still the circumstances are often such as to make a confession in the mind of the accused seem a desirable thing, and instances are not rare where false confessions have been made.[8]

COURT TO DETERMINE WHETHER VOLUNTARY.

85. The question whether or not a confession offered in evidence is voluntary is a preliminary question of fact, to be determined by the court.

Before the confession is submitted to the jury, the court must determine whether it is voluntary, within the requirements of the rule.[9] For this purpose it must hear such tes-

many others on board the ship think, that Brown is the murderer; but I don't know anything about it.'" This case probably reaches the extreme limit in favor of the accused of the application of the principle that confessions or statements to be admissible must be voluntary.

For a well-considered note respecting this decision, see 11 Harvard Law Rev. 408.

[8] Greenleaf cites the case of the two Boorns, convicted of the murder of Russell Colvin. Greenl. Ev. § 214, note 2. This case is also discussed in an article in the North American Review (volume 10, pp. 418–429).

[9] Com. v. Culver (1879) 126 Mass. 464. Upon the trial of X. for burglary, the prosecution offers the confession of X. X. objects, on the ground that the confession was made in consequence of offers of favor by the officer who arrested him. The prosecution called the officer, who denied he had made any such offers of favor. The defendant then offered to call five witnesses to prove the offers had been made, and asked the court to hear this testimony, and decide on the competency of the confession. This was refused, and the court permitted the evidence of the confession. Lord, J., says: "We are aware that it is not an uncommon practice in the trial of criminal causes, when confessions of a defendant are offered in evidence, and objected to on the ground that they were improperly obtained, for the presid-

timony as both sides may wish to submit. The statements of the witness offered to prove the confession are not to be taken alone, but the defense may put before the court such evidence as it has with respect to the making of the confession, and upon the whole testimony submitted the court must determine the matter, before permitting the confession to go before the jury.[10] Although the court may decide that on the testimony as to the circumstances under which the confession is made it satisfies the rule, and may therefore allow it to go before the jury, it is conceived that this will not prevent the jury from disregarding the confession if they believe from testimony submitted by the defendant that the confession never in fact was made, or that it is rendered valueless by other facts which came out in evidence.[11] And the jury may consider all the testimony in determining what weight to give to the confession.[12] As the prosecution offers and relies upon the confession, it has the burden before the court of establishing that

ing judge to allow the confessions, and all the evidence bearing upon the manner in which they were obtained, to be submitted to the jury, either to be rejected by the jury wholly, or to be allowed such weight as under all the circumstances the jury deem it proper to give them. This, however, as we understand it, is rather by consent than otherwise; neither party desiring to take the decision of the presiding judge upon the question of competency. * * * The prisoner has always the right to require of the judge a decision of the competency of the evidence." The Massachusetts doctrine is that the question is primarily a question for the court, but that, if the court determines in favor of the admissibility of the confession, the jury then have a right to consider all the testimony, and disregard the confession, if they conclude it was not voluntary. Com. v. Preece, 140 Mass. 276, 5 N. E. 494. See, also, Com. v. Russell, 156 Mass. 196, 30 N. E. 763; State v. Holden, 42 Minn. 350, 44 N. W. 123; People v. Howes, 81 Mich. 396, 45 N. W. 961; Wilson v. U. S., 162 U. S. 613, 624, 16 Sup. Ct. 895, 40 L. Ed. 1090; Burdge v. State, 53 Ohio St. 512, 42 N. E. 594.

In Com. v. Shew, 190 Pa. 23, 42 Atl. 377, the question whether a confession was voluntary or not was held properly left to the jury; but this is not the prevailing view.

[10] Sometimes the jury will be excluded from the room while the court hears the testimony as to the confession for the purpose of determining whether or not it is voluntary. State v. Drake, 82 N. C. 592.

[11] Williams v. State, 72 Miss. 117, 121, 122, 16 South. 296.

[12] Com. v. Howe, 9 Gray (Mass.) 110.

it is voluntary. If no evidence is introduced as to the circumstances under which the confession was made, it would seem that it should be excluded. The making of a confession by a person accused of crime is not such a common and natural occurrence as to justify the court in assuming without evidence that it was voluntarily made, and allowing its use, unless the question is raised by the defense.[13]

86. In considering whether or not a confession is voluntary, the internal workings of the mind of the accused cannot be examined. If, as a matter of fact, it appears that no outside influence, either by way of threat or promise, has induced the confession, the court will not inquire further.

For instance, the accused, when he himself opens negotiations to become a witness for the state, and pursuant to such arrangement, makes a confession, cannot afterwards, if he change his mind as to testifying against his accomplice, object to the use of the confession on the theory that he was induced to make the confession by the promise of immunity.[14] The mere presence of an officer at the time the confession is made

[13] Beckham v. State, 100 Ala. 15, 14 South. 859. See, also, State v. Staley, 14 Minn. 105 (Gil. 75). The Massachusetts doctrine seems to be contra. Com. v. Sego, 125 Mass. 210, 213.

[14] A. and X. are indicted for the murder of M. A. confesses orally to B., on the promise of B. that he will endeavor to get him admitted to be a witness for the state. Subsequently, B. applies to the attorney general, and procures the necessary protection for A. as a witness for the state. A. then makes a full written confession. Subsequently, A. refuses to testify against X.; and, upon his own trial, his verbal confession and the written one are offered against him. Is either of them admissible? Putnam, J., says: "He had solicited and obtained the protection of the government, and was at liberty to accept it on those terms, or to stand upon his defense. We cannot perceive how the prisoner, thus situated, could have any motive falsely to accuse himself, although he might have a motive to continue his false accusation against his accomplices. And besides, if any such motive could be supposed to operate, it was a new motive, and not arising from external influence. And it is no objection to the admission of a confession that it was made from interested motives, and with the hope of favor, if the motive is not excited by external influence." Com. v. Knapp (1850) 10 Pick. (Mass.) 477, 20 Am. Dec. 534.

will not render it involuntary,[15] or even the fact that it was made to an officer.[16]

JUDICIAL COMPULSION.

87. Any element of judicial compulsion will render a confession involuntary and inadmissible, though there be no threat or promise.

Statements made by the accused under oath before a judicial officer or body, without a knowledge of his rights, have an element of compulsion about them which precludes the idea of their being voluntary.[17] Statements made under such circumstances are objectionable also on the ground that their use would, in effect, be compelling the accused to testify against himself. They may not amount to a confession induced by threat or promise, but to something even more objectionable, namely, a confession procured by judicial compulsion.

THREATS OR INDUCEMENTS.

88. An inducement or threat, in order to vitiate a confession, must come from a person in authority, and must have some relation to the crime charged.

By a person in authority is meant some one who has the right or power to fulfill the promise or carry out the threat. The court cannot undertake to examine into all the collateral circumstances surrounding a confession. A person may be persuaded by friends, by a religious adviser, or by an attorney to make a statement of the facts which may amount to a confession, and such statement, if not privileged, by reason of the relation between the accused and the party to whom it is made, may be used. For example, X., who is charged with the murder of A., is induced by the chaplin of the jail to confess his sins. He accordingly confesses the crime with which he is

[15] Pierce v. U. S., 160 U. S. 355, 16 Sup. Ct. 321, 40 L. Ed. 454.

[16] People v. Wentz, 37 N. Y. 303; State v. Clifford, 86 Iowa, 550, 53 N. W. 299, 41 Am. St. Rep. 518.

[17] Kelly v. State, 72 Ala. 244–248.

charged. It has been held that such a confession is voluntary.[18] This case should not be construed as an authority that a clergyman may be compelled to disclose a confession made to him. It does not appear in the case itself by whom the confession was revealed. To be admissible, however, it is necessary that it should have been made either to some person not standing in the relation of a religious adviser, or to have been overheard by some such person.[19]

89. The fact that threats have been made or inducements have been offered does not vitiate the confession if it is made without regard to such threats or inducements.

It sometimes happens that it is sought to procure a confession from a person by threat or promise, but such efforts are unsuccessful. Subsequently, a confession is made. The mere fact that the threat or promise has been made does not vitiate the confession if it has had no influence upon the mind of the accused.[20] But it must clearly appear that the influence sought to be exerted by the previous threat or inducement has ceased to have any effect, and that the subsequent confession is made without reference to it.[21]

90. There is no element of threat, inducement, or compulsion in a magistrate taking down a confession where he makes a statement to the accused of his legal position, and that any statement he may make will be used against him.

[18] Reg. v. Gilham, 1 Moody, Crown Cas. 186.

[19] X. is accused of child murder. X., who is a servant in the employ of A., is induced by her mistress to confess. Such confession is admissible, since her mistress is not a person in authority. Reg. v. Moore, 2 Denison, Crown Cas. 522.

[20] X. is accused of the murder of A. M., a magistrate, tries to get X. to confess by promise of pardon. Before the confession is made, M. finds that no pardon can be granted, and he then informs X. of this fact. Subsequently X. makes a confession. The confession has been held voluntary. Reg. v. Clewes, 4 Car. & P. 221.

[21] Com. v. Myers, 160 Mass. 530, 36 N. E. 481; State v. Drake, 82 N. C. 592, 596.

It is quite common to inform the accused upon his arrest that "he need not say anything to criminate himself, and that what he does say will be taken down and used as evidence against him." Where this is done, and the prisoner then chooses to make a statement, it is admissible against him, and the mere fact that it is made to a magistrate, while the accused is under arrest, does not make it involuntary.[22]

Where the defendant submits himself to examination at an inquest or preliminary hearing, he of course subjects himself to cross-examination. It has sometimes happened that a severe cross-examination has elicited statements from an accused person in the nature of confessions, or at least of admissions, from which an inference of guilt might be drawn. The question then arises whether these statements may be used upon the trial of the accused. When the cross-examination has been unusually severe, so as to savor of brow-beating or compulsion, it has been held that admissions made could not be considered as freely and voluntarily made, and that they would, therefore, be excluded.[23]

91. Confessions procured by deception or under promises of secrecy are not, on this account alone, rendered inadmissible.

This, of course, applies to confessions which otherwise satisfy the conditions prescribed for admissibility. A friend who, for the purpose of obtaining a confession, promises to keep it secret, may, nevertheless, testify in regard to it. Deception alone will not render a confession inadmissible. It might seem that, in fairness to the accused, a confession obtained by fraud or artifice should not be used against him. As the ultimate object in view, however, is the truth as to the facts charged, and as deception of this sort is not likely to affect the reliability of a confession, it has not been held to render it inadmissible.[24]

[22] Reg. v. Baldry (1852) 2 Denison, Crown Cas. 430; People v. Chapleau, 121 N. Y. 266, 24 N. E. 469; State v. Branham, 13 S. C. 389.

[23] Parker v. State, 46 Tex. Cr. R. 461, 80 S. W. 1008, 108 Am. St. Rep. 1021. But see, contra, Wilson v. U. S., 162 U. S. 613, 16 Sup. Ct. 895, 40 L. Ed. 1090.

[24] People v. McCallam, 103 N. Y. 587, 593, 9 N. E. 502; State v.

CONFESSIONS UNDER INFLUENCE OF LIQUOR.

92. Confessions made by the accused when under the influence of liquor are not thereby rendered inadmissible. The extent of the intoxication, and its effect upon the mind, are questions to be submitted to the jury with the confession, and to be considered by them in determining its weight.

Any condition of mind which renders a person temporarily incompetent would make his statements while in such condition valueless, and while, perhaps, not inadmissible on the ordinary grounds which prevent confessions from being used, still, as they are of no value, they should not be allowed to be introduced. Thus, words spoken in sleep are held to be inadmissible.[25] If it appears that one is so intoxicated as to be incapable of understanding what he says or does, his confession should not be used against him.[26] The question as to the mental condition of the accused at the time of the making of the confession is held to be for the jury to determine upon such testimony as both sides may submit,[27] though it is prob-

Walker, 98 Mo. 95, 113, 9 S. W. 646, and 11 S. W. 1133; State v. Staley, 14 Minn. 105, 113 (Gil. 75); Burton v. State, 107 Ala. 108, 18 South. 284; Price v. State, 18 Ohio St. 418; King v. State, 40 Ala. 314, 320; Rex v. Derrington, 2 Car. & P. 418. In State v. Mitchell, 61 N. C. 447, the facts were as follows: X., arrested for murder, said to A., a fellow prisoner, "What in hell do you suppose I was arrested for?" A. replied he did not know, and after some further conversation X. said, "If you will not tell on me, I will tell you something." A. replied that he would not tell, but that, if he did, it would make no difference, for one criminal could not testify against another. X. then said, "I want to know what to do," and, upon A. saying that if he knew the circumstances he could tell him what to do, made a confession. It was held that the confession was properly admitted. See, for a somewhat similar case of a confession, made upon a promise not to tell, State v. Darnell, Houst. Cr. Cas. (Del.) 321.

In Com. v. Cressinger, 193 Pa. 326, 44 Atl. 433, the defendant confessed, after having been led to believe that the knife with which the crime had been committed had been found. The confession was held admissible. But see Bram v. U. S., 168 U. S. 532, 18 Sup. Ct. 183, 42 L. Ed. 568; Com. v. Myers, 160 Mass. 530, 36 N. E. 481.

[25] People v. Robinson, 19 Cal. 40.

[26] Com. v. Howe, 9 Gray (Mass.) 110; Eskridge v. State, 25 Ala. 30.

[27] Jefferds v. People, 5 Parker, Cr. R. (N. Y.) 522, 561. Also, Com.

able that in a case where there was no conflict as to the accused's mental incapacity at the time of the confession the court would not submit the confession to the jury at all.

EVIDENCE IN FORMER PROCEEDING.

93. Evidence given by the accused in a former proceeding or trial may be used as a confession, unless he was improperly compelled to testify.

The mere fact that the statement sought to be used as a confession has been given at a former trial and under oath does not render it inadmissible, unless the circumstances have been such as to have made it involuntary. While, in one sense, a witness under subpœna may be said to be compelled to testify, it is not in any sense that renders his testimony, if of a self-incriminatory nature, involuntary; for any witness may refuse to give testimony which might tend to incriminate him. If he does not avail himself of this privilege, he cannot complain of his testimony being used as a confession on the ground that it was not voluntary.[28] If the court has compelled him to testify after he has asserted his privilege, this will make the testimony involuntary, and it cannot be used as a confession on any subsequent trial.

Where, at a preliminary hearing before a magistrate or coroner, after the arrest of the accused, he is summoned as a witness, the failure to inform him of his right to refuse to testify as to anything which may tend to criminate him is sufficient to render any testimony he may give inadmissible on his trial.[29] In such a case it is not necessary that the accused as-

v. Howe, supra; State v. Feltes, 51 Iowa, 495, 501, 1 N. W. 755; State v. Grear, 28 Minn. 426, 10 N. W. 472, 41 Am. Rep. 296.

[28] Com. v. Reynolds, 122 Mass. 454, 458; People v. Chapleau, 121 N. Y. 266, 276, 277, 24 N. E. 469; Anderson v. State, 26 Ind. 89; Dickerson v. State, 48 Wis. 288, 292, 4 N. W. 321; Hill v. State, 64 Miss. 431, 440, 1 South. 494. Where one accused of murder went on the stand in his own behalf, and his cross-examination tended to show he had been guilty of the crime of adultery, for which crime he was afterwards indicted and tried, such cross-examination was held competent against him. State v. Witham, 72 Me. 531, 533, 534.

[29] People v. Mondon, 103 N. Y. 211, 8 N. E. 496, 57 Am. Rep. 709.

sert his privilege in order to be protected. If, however, the accused was summoned as a witness before it was ascertained that any crime had been committed, and before any arrest had been made, the fact that he is afterwards arrested does not change his character as a mere witness whose statements will be considered voluntary unless he himself claims his privilege.[30]

WHOLE CONFESSION MUST BE INTRODUCED.

94. Where a confession is used against an accused person, the whole confession must be introduced.

This rule is founded upon justice to the accused person. It is merely common fairness in the case of the introduction of a confession to require that everything that has been said by the accused in connection therewith, which may qualify or explain the confession, be introduced.[31] The mere fact that the accused has been interrupted, and therefore has not stated all that he might have stated, does not, however, render what he has stated inadmissible as a confession.[32] Nor does the fact that the witness overheard only a portion of a conversation render what he heard inadmissible, provided it was a complete confession of guilt.[33]

CONFESSIONS MAY BE EXPLAINED.

95. A confession, like an admission, is always open to explanation by the person against whom it is used.

A confession is of the same character as an admission, in that it constitutes a waiver of proof, rather than proof itself.

[30] Hendrickson v. People, 10 N. Y. 13, 61 Am. Dec. 721; U. S. v. Charles, 2 Cranch, C. C. (U. S.) 76, Fed. Cas. No. 14,786; State v. Gilman, 51 Me. 206; Com. v. King, 8 Gray (Mass.) 501; Alston v. State, 41 Tex. 39.

[31] Berry v. Com., 10 Bush (Ky.) 15; People v. Gelabert, 39 Cal. 663; McAdory v. State, 62 Ala. 154, 160.

[32] Levison v. State, 54 Ala. 520.

[33] Com. v. Pitsinger, 110 Mass. 101; McAdory v. State, 62 Ala. 154, 160.

The accused person, therefore, should have every right to explain or qualify the confession, so as to throw upon the prosecution the ordinary burden of proving, by evidence of the ordinary kind, the crime charged.[34]

As to the sufficiency of a confession to establish the guilt of the accused, it is now generally held that there must be corroborating evidence of some sort, either direct or circumstantial.[35]

EVIDENCE OBTAINED AS RESULT OF CONFESSION.

96. Evidence which has been obtained as a result of a confession is not rendered inadmissible from the fact that the confession itself has been obtained under circumstances which render it inadmissible.

Since the theory which excludes certain sorts of confessions, —i. e., that their reliability is doubtful—has no application to evidence which is independent of the confession, it matters not that such evidence has been obtained through a confession which has been procured by threat or promise. Discovery may be made of the whereabouts of stolen goods, or of the disposition of the body of a murdered person, or of other material facts, through a confession; and, while the confession itself could not be used, evidence as to the finding of the goods or the disposition of the body is admissible.[36] And it seems

[34] State v. Brown, 1 Mo. App. 86. Horton, in his work on Criminal Evidence (paragraph 623), says: "A confession is rather a fact to be proved by evidence than evidence to prove a fact."

[35] Blacker v. State (Neb.) 105 N. W. 302; Bergen v. People, 17 Ill. 426, 65 Am. Dec. 672.

[36] Rex v. Warickshall (1783) 1 Leach (4th Ed.) 263. X. and Y. were jointly indicted for grand larceny, and Y. was also indicted as accessory after the fact for having received the stolen goods. Y. made a full confession, under promise of favor. In consequence of the confession, the property was found, between the sackings of her bed. Assuming the confession itself to have been inadmissible, is the fact that the property was found in her possession admissible? The court say: "It is a mistaken notion that the evidence of confessions and facts which have been obtained from prisoners by promises or threats is to be rejected from a regard to public faith; no such rule ever prevailed. * * * This principle respecting confessions has no applica-

that, where the fact has been proved, evidence that its discovery was the result of a statement made by the prisoner is admissible.[87] In other words, the fact of the prisoner's knowledge of and statement as to the existence of the fact discovered is itself circumstantial evidence which cannot be shut out under the ordinary rule against involuntary confessions.

tion whatever as to the admission or rejection of facts, whether the knowledge of them be obtained in consequence of an extorted confession, or whether it arises from any other source; for a fact, if it exist at all, must exist invariably in the same manner whether the confession from which it be derived be in other respects true or false." U. S. v. Richard, 2 Cranch, C. C. (U. S.) 439, Fed. Cas. No. 16,154; Duffy v. People, 26 N. Y. 588, 590; Gates v. People, 14 Ill. 433, 437; Lowe v. State, 88 Ala. 8, 7 South. 97. In State v. Graham, 74 N. C. 646, 21 Am. Rep. 493, X. was on trial for larceny for stealing corn from a field. It appeared in evidence that fresh tracks of a single person were discovered in the field, leading from stalk to stalk; that new corn was found under X.'s bed, and that the officer who arrested him took him to the field where the corn was stolen; and the prosecution offered to show that the officer compelled him to put his foot in the tracks, and that it corresponded therewith. This testimony was objected to on the ground it was in the nature of a confession obtained under duress. The court admitted it as a piece of circumstantial evidence. In State v. Garrett, 71 N. C. 85, 17 Am. Rep. 1, X., a girl, charged with murder of A., a young girl 14 years old, claimed that A. had been accidentally burned, and that she (X.) had had her hand burned in trying to put out the flames. At the coroner's inquest, after a verdict had been rendered charging X. with the murder, she was compelled by the coroner to unwrap her hand, and exhibit it to a physician. No traces of burn were found. At the trial of X. the testimony of the physician was offered. It was objected to on the ground that nothing she had said or done under the compulsion of the coroner could be received, not having been cautioned and informed of her rights. The court ruled that, while nothing she had said

[87] Com. v. Knapp, 9 Pick. (Mass.) 496, 511, 20 Am. Dec. 491; Laros v. Com., 84 Pa. 200, 209; State v. Vaigneur, 5 Rich. Law (S. C.) 391, 404; Fredrick v. State, 3 W. Va. 695; White v. State, 3 Heisk. (Tenn.) 338; Lowe v. State, 88 Ala. 8, 7 South. 97; Weller v. State, 16 Tex. App. 200, 211. In Com. v. James, 99 Mass. 438, the view seems to have been taken that, while the fact of the prisoner having made a statement in consequence of which a hatchet with which it was claimed the murder charged had been committed was admissible, the substance of such statement was not. See, also, Yates v. State, 47 Ark. 172, 1 S. W. 65; Belote v. State, 36 Miss. 96, 118, 72 Am. Dec. 163; Beery v. U. S., 2 Colo. 186, 212.

IMPLIED CONFESSIONS.

97. Confessions by conduct and so-called "implied confessions" are not subject to the rules relating to confessions.

Evidence as to the conduct of an accused person is original evidence, from which there may be an inference of guilt.[88] Such evidence usually relates to his attitude or conduct in the presence of circumstances which would naturally affect his actions in a certain manner, or of statements made in his presence, which would naturally call for denial.[89] The general

could be admitted, the condition of her hand as a fact could be shown. See People v. McCoy, 45 How. Prac. (N. Y.) 216, for a case which holds that evidence obtained in this way is inadmissible on the ground that it is, in effect, compelling the accused to testify against himself. In U. S. v. Wong Quong Wong (D. C.) 94 Fed. 832, where private letters of defendant had been opened wrongfully by customs officials, it was held that they were inadmissible; the ground taken being that the evidence was obtained in violation of the fourth and fifth amendments to the Constitution. But it seems that they might well have been held inadmissible on the other ground that to admit them would be compelling the accused to testify against himself. For some observations on this case, and for other citations, see 13 Har. Law Rev. 302.

[88] In State v. Edwards, 13 S. C. 30, evidence of this sort was distinguished from confessions. The following charge was held erroneous: "That, if a party hears a criminal charge against himself, and made in his presence, and says nothing, it is an admission on his part, and in the eye of the law the party accepts that charge as his confession." The court say (page 32): "The effect of this charge was to give the silence of the parties the legal force and effect of confession of guilt. It must, in this respect, be distinguished from the proposition that the conduct of the parties under accusation of crime may be given to the jury as circumstances to be weighed in connection with the question of guilt or innocence." See, also, State v. Hill, 134 Mo. 663, 36 S. W. 223.

[89] Kelley v. People, 55 N. Y. 565, 14 Am. Rep. 342. Upon the trial of X. for larceny of money from A., A. was taken by an officer to the station house, to identify X., and when confronted with X. identified him, and stated the circumstances of the theft, and gave a description of the money stolen. X. was searched, and two rolls of money were found, one of which answered A.'s description. X. during all this time remained silent, but, when the money was found, asked to have the roll not described by A. kept separate, saying it was bar

doctrine is that such statements and the accused's conduct in reference thereto are not admissible unless the circumstances under which they are made are such that he is at liberty to make a reply without prejudice to himself, and that a reply is naturally called for unless he intends to admit their truth.[40]

money. Such conduct by X. is competent evidence on the question of his guilt. To the same effect are State v. Reed, 62 Me. 129, 141; Murphy v. State, 36 Ohio St. 628; Garrett v. State, 76 Ala. 18; State v. Bowman, 80 N. C. 432, 437; People v. Mallon, 103 Cal. 513, 37 Pac. 512.

[40] Com. v. Brown, 121 Mass. 69, 80. For example, where the statements are made by a witness in a former proceeding in the presence of the accused, he is neither at liberty to make a denial nor would it be proper for him to do so. His silence, under such circumstances, cannot be used against him. Broyles v. State, 47 Ind. 251. On the trial of X. for abortion, the question of X.'s violence towards his wife became material. The prosecution offered to show that in a prearranged interview between X. and his wife at the house of his father-in-law X. made no denial of the charges of violence made against him by the father-in-law. It appeared that, as a condition of the interview, X. had promised to keep his temper, and be on his good behavior. It was held, under these circumstances, his silence could not be used against him. Slattery v. People, 76 Ill. 217.

Opposite page 165
McKelvey on Evidence.

DEPARTMENT OF LAW

Notes on Evidence

When an issue has been reached in a judicial proceeding by means of the pleadings, the disputed facts are established in one of three ways:

1. By judicial notice.
2. By formal admissions of the parties.
3. By evidence.

The admissions referred to in 2 must not be confused with those admissions which are received in evidence (Chapter VI.). By admissions in 2 is meant those formally agreed upon by the parties during the proceeding, thereby rendering the production of evidence unnecessary. In effect they are the same as if they had been made in the pleadings.

The following rules governing the production of evidence in courts are often given as fundamental:

1. The evidence must be legally relevant.
2. Only the substance of the issue need be proved.
3. The burden of proof is on the party holding the affirmative.
4. The best evidence of which the case is susceptible must be produced.

Rule 4, "the best evidence rule," is practically limited to the production of documents (sec. 272).

Under Rule 1 a distinction is made between logical and legal relevancy. Evidence must be relevant, but all matters logically relevant are not necessarily received in court. Only those which are "legally relevant" are admitted (sec 99). For various reasons many subjects logically relevant are excluded, and the greater part of the law of evidence will be found to consist of *rules of exclusion* whereby matters logically relevant are deemed inadmissible as evidence (sec. 100).

These rules may be grouped as follows:

RULES OF EXCLUSION

The following kinds of evidence are inadmissible:

1	2	3	4
Matters unimportant, likely to mislead the jury, or to complicate the case unnecessarily, or of too slight, remote, or merely conjectural significance. (Jury must believe, not conjecture.) *Res inter alios acta.* Chapter VIII.	CHARACTER Exceptions: 1. In criminal cases under certain conditions. 2. In civil cases where character is a fact in issue. 3. Where character is an evidentiary fact, as in rape, etc 4. The character of a witness for veracity may be shown. Chapter IX.	OPINION *Exceptions: Expert opinions. Chapter X.	HEARSAY Exceptions: See Chapter XI.

*The following is an apparent (not a real) exception to the rule excluding opinion evidence.

The instantaneous conclusions of the mind as to the appearance, condition, mental or physical state of persons, animals and things, derived from observation, are, legally speaking, matters of fact, and are admissible in evidence. Thus, when a witness states that a man was drunk, crazy, angry, sober, etc., he is in one sense giving his opinion, but the law regards his conclusions as facts and admits them in evidence.

D. H. BOUGHTON.

CHAPTER VIII.

MATTERS EXCLUDED AS UNIMPORTANT, OR AS MISLEADING, THOUGH LOGICALLY RELEVANT.

98. Logical Relevancy as Affecting Admissibility.
99. Distinction Between Logical and Legal Relevancy.
100. Logical Relevancy the Main Ground of Admissibility.
101. Rule Excluding Unimportant and Misleading Matters.
102. Difficulty of Classification of Matters Excluded Under Rule Given.
103. Res Inter Alios Acta.
104–105. Relation of Other Sales to Proof of Value.
106. Collateral Acts Inadmissible Upon Question of Negligence.
107. When Admissible.
108. Subsequent Acts of Precaution.
109. Other Acts of Defendant.
110. Effect of Same Act on Other Persons.
111. Proof as to Dangerous Character of Obstruction or Excavation.
112. As to Defective Machinery or Appliance.
113. Proof as to Kinds of Appliances Used by Others in Same Line.
114. Evidence of One Crime Not Admissible to Prove Another.
115–115½. Proof as to Intent, Motive or Physical or Mental State.

LOGICAL RELEVANCY AS AFFECTING ADMISSIBILITY.

98. Logical relevancy is the first essential to the admissibility of all evidence. Only that which is logically relevant is admissible.

Stephen defines the word "relevant" as meaning "that any two facts to which it is applied are so related to each other that, according to the common course of events, one, either taken by itself or in connection with other facts, proves or renders probable the past, present, or future existence or non-existence of the other." [1] This is a definition of logical relevancy. Logical relevancy plays a certain part in the law of evidence, in that no evidence is admissible unless it is logically

[1] Steph. Dig. Ev. art. 1.

relevant. It does not follow that all evidence which is logically relevant is admissible, and in fact much that is logically relevant is excluded. Certain rules are laid down, founded on various considerations, by which many matters which are logically relevant are declared inadmissible.

DISTINCTION BETWEEN LOGICAL AND LEGAL RELEVANCY.

99. Legal relevancy is not different in its nature from logical relevancy. The only distinction is in its field of application. Legal relevancy is the attribute of all those logically relevant matters which are not declared inadmissible by one or more of the excluding rules.

Stephen proceeds upon the theory that logical relevancy is the main condition of admissibility, and that all rules excluding evidence which is logically relevant are, therefore, exceptions to the general rule. Other writers [2] have distinguished between logical and legal relevancy, finding the latter to apply to all those facts which are not excluded by any of the excluding rules of evidence. But if what is legally relevant can only be determined by this exclusionary method, it is of little use to retain the term.

LOGICAL RELEVANCY THE MAIN GROUND OF ADMISSIBILITY.

100. In general, it may be said, that what is logically relevant is admissible, unless it comes within the terms of one or more of the rules of exclusion. These rules of exclusion make up the bulk of the law of evidence.

This rule follows from what has been said above, and this and the following chapters will be taken up mainly with the rules which exclude matters logically relevant. In this chapter will be grouped together a certain number of matters, logically relevant, which the courts have excluded on various grounds of policy; matters which cannot be brought within any one

[2] Best, Ev. p. 251.

general rule, and which rest largely in the discretion of the court passing upon them.

RULE EXCLUDING UNIMPORTANT AND MISLEADING MATTERS.

101. Certain matters which are relevant are excluded because, although relevant, they are "likely to mislead the jury, or to complicate the case unnecessarily; or are of too slight, remote, or merely conjectural significance."

In treating of these matters it is necessary to bear in mind certain facts relating to the constitution of our courts and their methods of proceeding. The object of a trial is the ascertainment of the truth of the facts in issue between the parties, to the end that justice may be rendered. All things are to be made subservient to this object. There are considerations, however, which must govern the proceedings of the court in the carrying on of its business; considerations which, if lost sight of in any one case, would certainly affect the ability of the court to serve its purpose. These considerations consist of (1) a due regard for the limitations of the human mind in the consideration of disputed questions; (2) the tendency of minds, untrained to look at facts from a purely legal standpoint, to be influenced in their conclusions by sympathies and prejudices; (3) the limitations of time as compared with the multitudinous interests confided to the court for disposition. These considerations are the basis of the rule of exclusion above stated.

DIFFICULTY OF CLASSIFICATION OF MATTERS EXCLUDED UNDER RULE GIVEN

102. The only classification possible of matters excluded under the principles of this chapter is the statement of certain lines of inquiry which the courts have, in the decided cases, declared inadmissible.

There are no hard and fast rules which will fix upon certain facts the character of being too remote or misleading There are things, however, which are so clearly beyond the lim-

it that no difficulty is experienced in applying the rule of exclusion. Take a case, for instance, such as arose recently, where the defendant, a railway company, in support of its defense to an action for injuries to the plaintiff by reason of a collision, offered evidence that other passengers had not complained of having been injured in the accident and that none had made claim against defendant on account of the injuries. While it is conceivable that such evidence might have some remote logical relevancy, or at least might suggest a very weak inference with respect to the possibility of the plaintiff having received injuries, it is so far removed from the kind of evidence which we are accustomed to think of as a basis for inference, and it opens up so broad a field of collateral matters, as to be immediately recognized as impossible of consideration.[3]

The decision as to whether evidence logically relevant is within the excluding rule laid down in this chapter is largely dependent upon the facts in each case as they may be presented. Few cases are as clear as the one above mentioned.

Take the case where, in an action for causing the death of A., the defendant offered evidence to show that A. was stealing a ride on the train and fell off between the cars. To meet this, and as evidence of the fact that A. was walking along the track, the plaintiff offered evidence that A. had been kicked and shoved off another of defendant's trains about an hour before the accident in which he had been killed. Here the evidence doubtless had a certain probative force, and perhaps no fault can be found with the court for admitting it, although it is very near the line.[4]

[3] Foss v. Railway Co., 73 N. H. 246, 60 Atl. 747.

[4] Knoxville, C. G. & L. Ry. Co. v. Wyrick, 99 Tenn. 500, 42 S. W. 434. The evidence was admitted on the wrong ground, however, as it was held to be a part of the res gestæ, or, as the court expressed it, "a part of the history of the case."

To show an expectancy of life beyond that given in the mortality tables, a plaintiff offered to show the fact that his father and grandfather had lived to advanced ages. The evidence was excluded. This case is another illustration of the exclusion of evidence which, while undoubtedly of logical relevancy, is likely to raise collateral inquiries, which may consume time, and confuse the issues. Hamilton v. Railroad, 135 Mich. 95, 97 N. W. 392.

A single matter, it may happen, will be objectionable on all the grounds mentioned in the rule. It is not possible, therefore, to classify these matters in respect to the grounds of exclusion. By repeated decisions, however, in the several subjects of the law which have occupied the courts, certain matters have become recognized as falling within the rule, and it is therefore by examples of such matters that the best explanation of the rule may be given. The different classes of matters which have arisen most frequently, and in respect to the admission of which there is accordingly some sort of uniform practice, are given below.

RES INTER ALIOS ACTA.

103. The term "res inter alios acta," while it includes some of the matters covered by the rule of exclusion laid down in this chapter, also covers much that is admissible.

The term "res inter alios acta" has been applied to many matters of this sort; sometimes correctly, more often incorrectly. "Res inter alios acta" includes a part of those matters which are logically relevant, and, it may be, have a strong bearing upon the issues in the case, but which are on grounds of fairness excluded. It especially applies to matters which have been done or have happened at other times, and between other parties than those who are parties to the issues. Such matters may, by their resemblance to the acts in question, and their relation to the parties, form a basis of logical inference, but the admission of them would lead the court into too many collateral inquiries as to the particular circumstances of each case, and hence the general rule that such matters are inadmissible.[5]

[5] In an action by A. v. X. upon a promissory note, the defense was that the note was a forgery. X. offered evidence to show that A. was in the habit of forging signatures by a method of tracing them. With respect to this class of evidence the court says: "The law excludes such evidence upon grounds of public policy, to prevent the multiplication of issues in a case, and to protect a party from the injustice of being called upon, without notice, to explain the acts of his life not shown to be connected with the offense with which he is charged."

For example: A. brings an action against X., a Catholic charitable institution in which A. had been confined. The action was for false imprisonment and cruel treatment. A. offers evidence of the beating, by X.'s representatives in charge of the institution, of other persons who were inmates. Such evidence is inadmissible, as raising too many collateral questions, which might, in order to enable a just and fair inference to be drawn from the circumstance, have to be the subject of proof.[6]

This is a typical illustration of that kind of thing known as "res inter alios acta," and by reason of its nature is inadmissible.[7]

Costelo v. Crowell, 139 Mass. 588, 591, 2 N. E. 698. In support of the same principle are Boyd v. U. S., 142 U. S. 450, 458, 12 Sup. Ct. 292, 35 L. Ed. 1077; Newhall v. Appleton, 102 N. Y. 133, 6 N. E. 120; Coleman v. People, 55 N. Y. 81, 90; Dodge v. Haskell, 69 Me. 429, 435; Aiken v. Kennison, 58 Vt. 665, 5 Atl. 757; Benedict v. Rose, 24 S. C. 297; Franklin v. Franklin, 90 Tenn. 44, 16 S. W. 557; State v. Moberly, 121 Mo. 604, 26 S. W. 364; Traverse v. State, 61 Wis. 145, 20 N. W. 724. The length to which the court may go under the circumstances of a particular case is seen in Nickerson v. Gould, 82 Me. 512, 20 Atl. 86. Here A. sued X. on a promissory note. The defense was that the note was a forgery, and that X. never had any dealings with M., the payee, out of which the note could have resulted. As bearing on the probability of X. having given the note, evidence was allowed showing the dealings had between M. and X. In describing their dealings, X., while on the stand as a witness, stated a certain conversation had by him with M. in reference to the note, in which M. referred to past dealings alleged to have been had by him with X., and, among other things, said, "Don't you remember my paying H. $15 for you?" to which X. replied, "No, sir; I don't remember it, and you never did." After testifying to this conversation, X. called H. as a witness, and offered to prove that M. never in fact had paid H. $15. This item was not one claimed by the plaintiff as a part of the consideration of the note. The court excluded the testimony. On appeal it was held that it should have been admitted, as showing the falsity of the assertion made by M., in reference to the dealings between himself and X., and thus, in some degree, bearing upon the probability of X. having made the note. This seems somewhat beyond the limit of reasonable inquiry, and it is submitted that the truth or falsity of M.'s assertion as to his dealings with X. was of too little importance to justify going into conflicting proof upon it.

[6] Smith v. Sister of Good Shepherd, 87 S. W. 1083, 27 Ky. Law Rep. 1170.

[7] Evidence tending to prove misconduct of a sister of testator and

There are, however, many things which are "res inter alios acta" which are admitted. This will be seen in the illustrations of the principles laid down later in this chapter. There is no general rule that excludes all matters of this sort, and the phrase is correctly used only as designating a certain class of matters, some of which are excluded not because they are "res inter alios acta," but because they are objectionable on some of the grounds of policy which have been mentioned; as that they will tend to confuse the issues, or are of too slight importance to justify spending the time of the court with them. It is not sufficient, therefore, to inquire whether a matter is "res inter alios acta." To determine its admissibility, one must go further, and test it by the other principles laid down in this chapter. In fact, there is little or no value in the use of the phrase in this connection, as it does not describe any distinctive class of matters which are inadmissible.

RELATION OF OTHER SALES TO PROOF OF VALUE.

104. Upon the questions of the value of land evidence of the sale of other land at other places is inadmissible, as tending to complicate the issues.

105. In some jurisdictions it is held that such evidence is admissible in the discretion of the court if it be shown that the other land is similar in character to that the value of which is in question.

The rule is not entirely uniform in regard to matters of this sort, although the better opinion seems to be that such evidence is inadmissible. To submit this class of evidence to the jury means to put the jury in place of the expert on real-estate value. Ordinarily, so many elements go to make up the idea of value that it is better to put the expert before the jury, let him give his opinion, and be subjected to such cross-examination as may show to what weight it is entitled, rather than to

of the undue influence of such sister over her mother is too remote and too likely to complicate the issues to be admissible in evidence upon the question of whether the sister exerted undue influence over testator. Rapp v. Becker, 26 Ohio Cir. Ct. R. 321. See, also, Lewis v. Crouch (Tex. Civ. App.) 85 S. W. 1009.

complicate matters by endeavoring to put before the jury all the facts which will enable it to arrive, in the first instance, at an idea of value. The issue in the case being the value of a particular piece of land, the evidence should be confined to the condition of that particular land, and the opinion of such persons as are competent to judge of such value. The sale of another piece of land in the vicinity, while it may be some criterion of the value of the piece in question, will also raise a distinct issue as to the conditions under which the sale was made; and when the proof is sought to be extended to a number of pieces, there is too much danger that the original issue will be lost sight of in the testimony as to the other pieces of land. For, of course, if one party be permitted to show that it sold for a certain price, the other must be permitted to show that such price was obtained because of certain special conditions, which may not exist in the case of the land in question. The real issues in the action would thus be confused, the minds of the jury perhaps misled, and the time of the court unduly consumed, while proof might be carried to an indefinite extent in following up the numerous collateral cases.[8] There are

[8] In re Thompson (1891) 127 N. Y. 463, 28 N. E. 389, 14 L. R. A. 52. Upon the assessment of damages for taking certain water rights under act of legislature, evidence was offered of the amount paid for other water rights appurtenant to a neighboring parcel of land, and excluded. Parker, J., says: "Thus, each transaction in real estate claimed to be similarly situated might present two side issues, which could be made the subject of as vigorous contention as the main issue; and, if the transactions were numerous, it might result in unduly prolonging the trial and unnecessarily confusing the issues, with the added disadvantage of rendering preparation for trial difficult." Amoskeag Manuf'g Co. v. Head (1879) 59 N. H. 332. Under petition for assessment of damages for taking flowage rights, evidence was offered of the sums paid by plaintiff to thirty-two other persons for flowage rights, and was excluded. Doe, C. J., says: "The evidence of the sums paid for flowage in the thirty-two other cases, if, as a matter of law, it was not incompetent, might be excluded on the ground that, as a matter of fact, it has so slight or remote a bearing on this case that it would be unjust or unreasonable to prolong and complicate the trial by such an investigation of those cases as would be necessary for obtaining from them any useful information." To the same effect, see Pennsylvania S. V. R. Co. v. Ziemer, 124 Pa. 560, 571, 17 Atl. 187; Currie v. Railroad Co., 52 N. J. Law, 381, 397, 20 Atl. 56, 19 Am. St. Rep. 452; Spring Valley Waterworks v. Drinkhouse, 92 Cal. 528, 532,

certain cases where the usefulness of evidence of this character may be conceded; such cases, for example, as involve the determination of the value of vacant lots, which are subdivisions of large tracts of similar lots. Here the ease with which similarity may be shown would seem to make evidence of other sales important evidence of the value of any particular parcel.

In such a case as this the question of value is more nearly akin to a similar question in the case of personal property, where similarity between articles of the same kind becomes of such importance as to practically determine the basis upon which value is proved. The sales of similar articles estab-

28 Pac. 681. The Massachusetts rule, as illustrated by Paine v. City of Boston (1862) 4 Allen, 168, is contra. Upon a petition for a jury to assess damages for the taking of land for the widening of a street, the petitioner offered, to show the value of the land taken, evidence of sales of several lots on the same street, one of which was within a distance of 176 feet from the land taken. The evidence was excluded on the ground that the lots were too remote from the land taken. Bigelow, C. J., says: "No doubt, it was the province of the judge to determine whether the lots, concerning the sale of which the petitioner offered evidence, were so similar in their situation, relative position, and other circumstances bearing on their value, as to make the sale of them evidence which would properly guide the jury in estimating the value of the petitioner's land. If, on a consideration of all the circumstances, he had rejected evidence concerning them, his ruling would not have been open to exception. But the exclusion of the evidence was solely on the ground that the lots were at too great a distance from the land of the petitioner. To sustain the ruling, it would be necessary for us to decide that the price paid for a lot of land situated on the same street with that which was the subject of controversy could not be shown, because it was one hundred and seventy-six feet distant therefrom. Such is not the rule of law. Sales of land in the vicinity were competent, if the lots were in all respects similar to that owned by the petitioner; and evidence concerning such lots could not properly be rejected." See, also, Gardner v. Inhabitants of Brookline, 127 Mass. 358; Town of Cherokee v. Sioux City & I. F. Town Lot & Land Co., 52 Iowa, 279, 3 N. W. 42; Washburn v. Railroad Co., 59 Wis. 364, 18 N. W. 431. The Massachusetts doctrine prevails in Illinois (Peoria Gaslight & Coke Co. v. Peoria Terminal Ry. Co., 146 Ill. 372, 34 N. E. 550, 21 L. R. A. 373), Iowa (Town of Cherokee v. Sioux City & I. F. Town Lot & Land Co., 52 Iowa, 279, 282, 284, 3 N. W. 42), and in Wisconsin (Watson v. Railway Co., 57 Wis. 332, 350, 15 N. W. 468).

lishes market value in the case of personal property, and market value as thus established becomes the measure for recovery in all cases where special circumstances do not interfere to make some special rule applicable. If the question be as to value of a staple, such as sugar, coffee, wheat, or other foodstuff, or of some metal, or of a security, such as some railroad stock or bond, it is the sales of similar things which establish the governing value.

Nor is there here any question of special proof of similarity, as in the case of real estate, where proof of actual sales is sought to be introduced, yet the inquiry as to value is in form not an inquiry as to particular sales, but as to market value.

The question of a relevancy too remote to be useful does, however, arise in the case of personal property as in the case of real property. Instead, however, of relating to sales of other things, it relates to sales made at other times or other places. It is one of the requisites of proof of value in the case of personal property that the market value shall be shown at the time and the place in question with respect to the commodity, the value of which is in issue, and value of the same commodity at other times and other places is generally excluded as being within the principle set forth in this chapter.[9]

It is not always the case that there have been sales of a commodity at the place at which value is in question, and in such cases value at other places becomes of sufficient relevancy on the theory that it is the best evidence which can be produced to justify its admission. This is quite apt to be the case where an article is bought or sold and delivery is agreed to be made at some small place, where there is no trade in the article in question. It is then necessary to resort to evidence of market value based upon sales taking place at some nearby market.[10]

[9] Lundvick v. Insurance Co., 128 Iowa, 376, 104 N. W. 429; Texas & P. Ry. Co. v. Stephens (Tex. Civ. App.) 86 S. W. 933.

It must have been upon an assumption of the continuance of the same conditions that the value of a damaged automobile, some months after the time at which the condition of the machine was in question in the case, was allowed to be shown in White Sewing Mach. Co. v. Beverage Co., 188 Mass. 407, 74 N. E. 600.

[10] Kibler v. Caplis, 140 Mich. 28, 103 N. W. 531, 112 Am. St. Rep. 388.

This subject of value illustrates very clearly the principle upon which courts have always proceeded with reference to proof, and shows the influence which practical conditions has exerted in moulding rules respecting the admission of evidence. Where there is an abundance of available evidence of a more convincing nature, evidence, though logically relevant, less convincing in character, will not be received, because there is no practical reason why it should be. When, however, the less conclusive evidence is the only evidence which can be had, then the court will always receive it, as bringing some light to the issue and as helpful in some degree.[11]

COLLATERAL ACTS INADMISSIBLE UPON QUESTION OF NEGLIGENCE.

106. Upon the question of negligent conduct in the management of a business, evidence as to the manner in which similar business is carried on by others is not admissible as a standard of comparison.

The question of negligence is one which in each case must be determined by reference to the particular facts and circumstances of such case. X. conducts his business in a certain manner, and an injury results to A. The fact that Y. conducts his business in a different manner, and no injury results, is not evidence that X.'s conduct was negligent. One person or a dozen persons cannot, by conducting their business in a particular manner, make that manner the standard of safety. Evidence of this sort is therefore inadmissible except in certain cases and for certain collateral purposes, referred to in the following sections. With the natural tendency to judge the conduct of one person by reference to conduct on the part of

[11] As an instance of the principle cited in the text the following case is an interesting one: The question was as to the value of certain corporate stock, and, there being no market value and no sales, the court permitted an inquiry into the nature and amount of the business done by the corporation, the amount of dividends paid, and other facts relating to the financial condition of the corporation, all of which would have been excluded in the case of a stock actively dealt in. Butler v. Wright, 103 App. Div. 463, 93 N. Y. Supp. 113.

another which is approved by the mind, such evidence would be extremely misleading, and productive of grave injustice, if admitted generally and for the purpose of supplying to the jury a ready-made standard, in place of the standard which in each case the jury should set up for itself from all the evidence submitted.[12]

[12] In Maynard v. Buck (1868) 100 Mass. 40, A. sued X. for the value of a pair of steers lost through X.'s negligence. Testimony as to what was the usual practice of persons in similar business (that of drover) was admitted, and X. requested the court to charge that "if he did do the things that drovers of common prudence, engaged in the same business, ordinarily do, he was not guilty of such negligence as will make him liable in the action." This was refused. Wells, J. (page 47), says in reference to this: "But this is not the legitimate application of evidence admitted to show the usual practice in similar cases. * * * That which is admissible in evidence is, not the particulars, but what the witnesses state, from their knowledge of those particulars, to be usual, or the course ordinarily pursued. The character for prudence of those whose conduct or acts go to make up this usual practice is not required to be shown. It forms no part of the inquiry. The effect and purpose of the evidence is to aid the jury in forming their judgment of what the party was bound to do, or was justified in doing, under all the circumstances of the case. What had been done by others previously, however uniform in mode it may be shown to have been, does not make a rule of conduct by which the jury are to be limited and governed. It is not to control the judgment of the jury, if they see that, in the case under consideration, it is not such conduct as a prudent man would adopt in his own affairs, or not such as a due regard for the obligations of those employed in the affairs of others would require them to adopt. It is evidence of what is proper and reasonable to be done, from which, together with all the other facts and circumstances of the case, the jury are to determine whether the conduct in question in the case before them was proper and justifiable." In Wabash Ry. Co. v. McDaniels, 107 U. S. 454, 2 Sup. Ct. 932, 27 L. Ed. 605, commenting on the claim that what is ordinary care, as required on the part of a railroad company, is what it is customary for railroads to observe, Mr. Justice Harlan says (pages 460, 461, 107 U. S., and page 937, 2 Sup. Ct. [27 L. Ed. 605]): "Ordinary care, then,—and the jury were, in effect, so informed,—implies the exercise of reasonable diligence; and reasonable diligence implies, as between the employer and employé, such watchfulness, caution, and foresight as, under all the circumstances of the particular service, a corporation controlled by careful, prudent officers ought to exercise. These observations meet, in part, the suggestion made by counsel that ordinary care in the employment and retention of railroad employés means only that degree

SAME—WHEN ADMISSIBLE.

107. Such evidence may, however, be admissible to enlighten the jury as to the nature of the business, risks involved, and ordinary known methods of meeting them, in order that it may intelligently judge as to the acts charged to be negligent.

There are certain lines of business with which the ordinary person is not familiar; lines where many men are employed in many different departments, and where extensive and varied interests are involved; where methods have by long experience been systematized, and only those accomplishing best results retained and established. Such lines of business are those usually carried on by semipublic corporations,—railroads, telegraphs, large manufacturing and mining companies. Where a question arises as to negligence on the part of such a defendant, the personal element is usually lacking, and the matter is reduced to a question of whether some method adopted is the most approved method of handling the particular branch of the business in which the injury has been occasioned. Here

of diligence which is customary, or is sanctioned by the general practice and usage which obtains, among those intrusted with the management and control of railroad property and railroad employés. To this view we cannot give our assent. If the general practice of such corporations in the appointment of servants is evidence which a jury may consider in determining whether, in the particular case, the requisite degree of care was observed, such practice cannot be taken as conclusive upon the inquiry as to the care which ought to have been exercised." The question of the admissibility of this class of evidence did not arise in this case, but in Grand Trunk R. Co. v. Richardson, 91 U. S. 454, 23 L. Ed. 356, evidence was offered by the defendant to show that the usual practice of railroad companies was not to employ watchmen for bridges like the one the burning of which caused the destruction of the plaintiff's buildings. Mr. Justice Strong says (page 469 of 91 U. S. [23 L. Ed. 356]): "It is impossible for us to see any reason why such evidence should have been admitted. The issue to be determined was whether the defendant had been guilty of negligence; that is, whether it had failed to exercise that caution and diligence which the circumstances demanded, and which prudent men ordinarily exercise. Hence the standard by which its conduct was to be measured was not the conduct of other railroad companies in the vicinity; certainly, not their usual conduct."

we find a case where the jury, unfamiliar with ordinary and practical methods of carrying on such business, will be all at sea as to the matter unless some information be given them. In such cases there seems to be a real use for evidence of what methods are adopted by other concerns, not to stamp the defendant's method as a negligent one, but to enable the jury to intelligently determine whether it was or was not.[18]

SUBSEQUENT ACTS OF PRECAUTION.

108. Precautions taken by persons, charged with a responsibility for injuries, after the occurring of such injuries are not admissible to show previous negligence.

This is law both in this country and in England. A person charged with negligence, by reason of which an injury has resulted, may take action looking towards the remedying of the defect which has caused the injury. This may or may not indicate a consciousness on his part that the defect existed and could have been remedied before. If introduced as evidence, however, it is almost certain that the jury would look at it as an admission of responsibility. At least there is great risk of its misleading them by withdrawing their minds from the real issue, which is whether the person charged with negligence exercised reasonable care before and at the time the injury

[18] Maynard v. Buck, supra; Lane v. Railroad Co., 112 Mass. 455, 463; Berg v. Leather Co., 125 Wis. 262, 104 N. W. 60. The case of Cass v. Railroad Co. (1867) 14 Allen (Mass.) 448, in which A. sued X., as a warehouseman, for failure to deliver a tub of sugar, and it was held competent for X. to prove that he exercised the same care as by others in the same business, and the sugar was stolen, goes a little too far in the language of its decision, though it is probable that the court did not consider the evidence as establishing any standard, nor admit it for that purpose. Colt, J., says (page 449): "If the defendants exercised due and ordinary care in the custody of the property, they cannot be charged for its loss. What constituted such care was a question of fact, to be judged of with reference to all the circumstances, and especially with reference to the degree of care which other persons engaged in similar business in the vicinity were in the habit of bestowing on property similarly situated." See, also, Boyce v. Lumber Co., 119 Wis. 642, 97 N. W. 563.

occurred. Reasonable care before the accident may be one thing, and reasonable care after the accident, with the increased knowledge of danger which the happening of the accident has brought, may be quite another.[14]

OTHER ACTS OF DEFENDANT.

109. The effect of acts of similar character to the one from which the injury is claimed to have resulted, performed by the defendant in respect to other persons, cannot be shown upon the question of negligence.

[14] Columbia & P. S. R. Co. v. Hawthorne, 144 U. S. 202, 12 Sup. Ct. 591, 36 L. Ed. 405. A. v. X. for damages for injuries caused by X.'s negligence in providing an unsafe machine. A. offers to prove that, shortly after the accident, X. altered and repaired the machine. Is it admissible? Justice Gray says: "But it is now settled, upon much consideration, by the decisions of the highest courts of most of the states in which the question has arisen, that the evidence is incompetent, because the taking of such precautions against the future is not to be construed as an admission of responsibility for the past, has no legitimate tendency to prove that the defendant has been negligent before the accident happened, and is calculated to distract the minds of the jury from the real issue, and to create a prejudice against the defendant." In the case of Hart v. Railway Co., 21 Law T. (N. S.) 261, 263, Baron Bramwell said: "People do not furnish evidence against themselves simply by adopting a new plan in order to prevent the recurrence of an accident. I think that a proposition to the contrary would be barbarous. It would be, as I have often had occasion to tell juries, to hold that, because the world gets wiser as it gets older, therefore it was foolish before." See, to the same effect, Shinners v. Proprietors of Locks & Canals, 154 Mass. 168, 28 N. E. 10, 12 L. R. A. 554, 26 Am. St. Rep. 226; Getty v. Town of Hamlin, 127 N. Y. 636, 27 N. E. 399; Nalley v. Carpet Co., 51 Conn. 524, 50 Am. Rep. 47; Board of Com'rs of Wabash Co. v. Pearson, 129 Ind. 456, 28 N. E. 1120; Hodges v. Percival, 132 Ill. 53, 23 N. E. 423; Lombar v. Village of East Tawas, 86 Mich. 14, 48 N. W. 947; Ely v. Railway Co., 77 Mo. 34; Kuhns v. Railway Co., 76 Iowa, 67, 40 N. W. 92; Day v. Lumber Co., 54 Minn. 522, 528, 56 N. W. 243, 23 L. R. A. 513; Missouri Pac. Ry. Co. v. Hennessey, 75 Tex. 155, 12 S. W. 608. Such evidence is equally inadmissible whether brought out by direct or cross examination. Jennings v. Town of Albion, 90 Wis. 22, 62 N. W. 926. The rule in Pennsylvania is contra to the doctrine followed by the cases cited above. Lederman v. Railroad Co., 165 Pa. 118, 30 Atl. 725, 44 Am. St. Rep. 644, cases cited page 125, 165 Pa., and page 726, 30 Atl. (44 Am. St. Rep. 644). And in Kansas it is held that evi-

Acts of this sort are "res inter alios acta," or things done in reference to others, and are held to have no bearing upon the things charged as done by the defendant in respect to the plaintiff. For example, the fact that the defendant has delivered goods of certain quality to X. does not show that similar goods delivered to the plaintiff were of the same quality. So, also, the fact that the defendant has been negligent, with a similar resulting injury, in respect to others in the same way in which it is charged he has been negligent in respect to the plaintiff, is not admissible.[15] This class of evidence might in certain cases lead to some slight inference as to the main fact in issue, but it would involve such a multiplicity of collateral issues that it would tend to confuse the minds of the jury, and obscure the real question before them.[16]

dence of subsequent repairs is admissible to show previous defective condition, but not to show knowledge of such condition on the part of the defendant. Harter v. Railroad Co., 55 Kan. 250, 257, 38 Pac. 778.

[15] Holcombe v. Hewson (1810) 2 Camp. 391, was as follows: A. v. X. on an agreement by which X. was to take the beer which he sold from A., or else pay a large rent for the house he occupied, of which A. was the owner. X. claimed the beer was of poor quality. A. offered to show by other customers of his that the beer supplied to them at the time that X. was buying of another brewer, and refused to take A.'s beer, was of excellent quality. Lord Ellenborough says: "This is res inter alios acta. We cannot here inquire into the quality of different beer furnished to different persons. The plaintiff might deal well with one, and not with the others." In Emerson v. Light Co. (1862) 3 Allen (Mass.) 410, the action was by A. v. X. for injury to A.'s health from gas escaping from X.'s pipes. It was proved that gas escaped from X.'s pipes, and passed under the frozen earth, through sewers, into A.'s cellar and house. A. offers to show that a large number of houses in the neighborhood, the drains of which were connected with the same sewers as A.'s house, were filled with gas, and that, wherever the gas entered, sickness followed. Merrick, J., says (page 417): "If such evidence was admissible, the issues in a single cause might be indefinitely multiplied; and this would tend only to confusion and to mislead the jury." To the same effect is Gulf, C. & S. F. Ry. Co. v. Rowland, 82 Tex. 166, 18 S. W. 96.

[16] In an action for damages against a railroad company for refusing to deliver a car loaded with cotton seed on a side track at plaintiff's warehouse, evidence cannot be given of a refusal of the same character at other times before and after the instance alleged. Central R. of Georgia v. Brokerage Co., 122 Ga. 646, 50 S. E. 473, 69

EFFECT OF SAME ACT ON OTHER PERSONS.

110. The effect, however, of the particular act charged as negligent upon others at the same time may be admissible.

Where the negligent act has resulted in similar injury to a number of persons, their evidence of this fact may serve to show that the injury in question resulted from such act, and not from some other cause.[17] If a number of persons similarly situated are all made sick by the same act of negligence for which plaintiff seeks damages, and defendant denies that the plaintiff's sickness was caused by his act, the apparent effect on the other persons is a strong piece of circumstantial evidence to support plaintiff's claim. In such a case it seems proper to admit the evidence, though it must necessarily be limited to the bare facts, and not be allowed to degenerate into a minute collateral inquiry as to the circumstances of each case of sickness. This is one of those cases where the discretion of the court must control the inquiry as fairness and the particular circumstances of the case may seem to demand.

PROOF AS TO DANGEROUS CHARACTER OF OBSTRUCTION OR EXCAVATION.

111. Upon the question of the dangerous character of an obstruction or excavation it has been generally held that its effect at other times may be shown.

A distinction has been made between cases of this sort and cases where the question is as to the conduct of a person; it being held that, in showing a dangerous quality of a thing, testimony as to its effect at other times may be given. Thus,

L. R. A. 119. So, in an action against a bank for refusal to pay a check, evidence of other instances of dishonor of plaintiff's checks is inadmissible. Some interesting observations upon this class of evidence will be found in 17 Harvard Law Rev. 349.

[17] In Hunt v. Light Co. (1864) 8 Allen (Mass.) 169, 85 Am. Dec. 697, it was held that evidence that other persons in the same house were in good health before the escape of the gas, and became sick immediately thereafter, was admissible, but that the particulars of each case would not be inquired into.

in a case where an action was brought for damages for injury occasioned by a pile of lumber in the highway, which frightened plaintiff's horse, testimony that the same pile of lumber had frightened other horses was held competent, as showing the terrifying quality of the obstruction.[18] This, however, is not the universal rule.[19] The whole question is one which must

[18] In Darling v. Westmoreland (1872) 52 N. H. 401, 13 Am. Rep. 55, the action was by A. v. X. for damages for an injury occasioned by defects in the highway, consisting of a pile of lumber likely to frighten horses, and an insufficient railing of a bridge. A. offered to show that F.'s horse, in being driven past the lumber, took fright thereat. The evidence was held admissible. Doe, J., says: "The terrifying quality of the pile being in question, the terror of Fletcher's horse is no more collateral than the terror of Darling's. Should they both be excluded from the consideration of that question? And should the evidence that the plaintiff's horse was vicious and unsafe on other occasions also have been excluded?" In District of Columbia v. Arms (1883) 107 U. S. 519, 2 Sup. Ct. 840, 27 L. Ed. 618, the action was by A. v. X. for damages for personal injury caused by a defective sidewalk. Is evidence of a policeman that he had seen as many as five persons fall at the same place competent? Justice Field says: "The frequency of accidents at a particular place would seem to be good evidence of its dangerous character; at least, it is some evidence to that effect. Persons are not wont to seek such places, and do not willingly fall into them. Here the character of the place was one of the subjects of inquiry to which attention was called by the nature of the actions and pleadings, and the defendant should have been prepared to show its real character, in the face of any proof bearing on that subject." In an action against the city of Chicago to recover damages resulting from the death of a person who, in the night, stepped off an approach to a bridge while it was swinging around to enable a vessel to pass, and was drowned,—it being alleged that the accident happened by reason of the neglect of the city to supply sufficient lights to enable persons to avoid such dangers,—the supreme court of Illinois held, that it was competent for the plaintiff to prove that another person had, under the same circumstances, met with a similar accident. City of Chicago v. Powers, 42 Ill. 169, 89 Am. Dec. 418. To the objection that the evidence was inadmissible, the court said: "The action was based upon the negligence of the city in failing to keep the bridge properly lighted. If another person had met with a similar fate at the same place, and from a like cause, it would tend to show a knowledge on the part of the city that there was inattention on the part of their agents having charge of the bridge, and that they had failed to provide proper means for the protection of persons crossing on the bridge."

[19] In Temperance Hall Ass'n v. Giles, 33 N. J. Law, 260, the facts

rest in the sound discretion of the court. There is a danger in admitting the evidence, in that it opens the door to such a wide field of collateral inquiry; a field of inquiry, too, from which it would be unjust to exclude the party against whom the evidence operates. If, for example, in the case of the pile of lumber referred to above, the plaintiff is allowed to show that it frightened another horse, defendant should be allowed to meet this by showing that such other horse was by nature a vicious horse, which was in the habit of becoming frightened without cause. It is believed that less injustice would result from the entire exclusion of this class of evidence than from the limitation of the collateral inquiry after the door is once opened to it.

AS TO DEFECTIVE MACHINERY OR APPLIANCE.

112. If the question be as to the character of appliances used by the defendant, the effects of such appliances at other times may become admissible, as showing what their character is.

The principle above stated finds its most frequent application in the cases relating to the setting of fires by locomotives, though it is not confined to them.[20] It is now very generally

brought up the question of the dangerous character of an area, and the court refused to admit evidence that other persons had passed the area without injury, for the purpose of showing its character was not dangerous. Depue, J., says (page 264): "It would not be competent for the party suing to prove, as tending to show that it was a nuisance, that at other times other persons fell into the excavation. Collins v. Inhabitants of Dorchester, 6 Cush. (Mass.) 396; Hubbard v. Railroad Co., 39 Me. 506. Nor is it competent for the defendant to introduce evidence that other persons, at other times, when the area was in the same condition, passed the place complained of without receiving any injury. Aldrich v. Inhabitants of Pelham, 1 Gray (Mass.) 510; Kidder v. Inhabitants of Dunstable, 11 Gray (Mass.) 342. The reason for excluding all evidence of this character is that it would lead to the trial of a multitude of distinct issues, involving a profitless waste of the time of the court, and tending to distract the attention of the jury from the real point in issue, without possessing the slightest force as proof of the matters of fact involved."

[20] In Findlay Brewing Co. v. Bauer, 50 Ohio St. 560, 35 N. E. 55,

held that, for the purpose of showing the character of the engines used by the defendant, and thus as indirectly bearing upon the question of its negligence, in connection with testimony showing what are safe and proper engines, evidence of the manner in which the engines worked at other times is admissible.[21] There are several distinctions which should be noted in this class of cases. There are always two facts to be proved,—the setting of the fire, and the negligence. It is the better opinion that evidence of this character is admissible upon both questions.[22] There are cases, however, which have

evidence of his kind was held competent to show the dangerous character of a lift used to elevate barrels.

[21] Thomp. Neg. p. 159; 1 Greenl. Ev. p. 446; Grand Trunk R. Co. v. Richardson, 91 U. S. 454, 470, 471, 23 L. Ed. 356; Field v. Railroad, 32 N. Y. 339; Haseltine v. Railroad, 64 N. H. 545, 15 Atl. 143; Cleaveland v. Railway Co., 42 Vt. 449, 457; Henderson v. Railroad Co., 144 Pa. 461, 481, 22 Atl. 851, 16 L. R. A. 299, 27 Am. St. Rep. 652; Green Ridge R. Co. v. Brinkman, 64 Md. 52, 60, 20 Atl. 1024, 54 Am. Rep. 755; Longabaugh v. Railroad Co., 9 Nev. 271; Diamond v. Railroad Co., 6 Mont. 580, 586, 13 Pac. 367. Where the evidence is as to the manner in which the engine worked after the fire, to render it admissible it must appear that the engine was in the same condition as at the time of the fire. Collins v. Railroad Co., 109 N. Y. 243, 250, 16 N. E. 50.

[22] Sheldon v. Railroad Co. (1856) 14 N. Y. 218, 67 Am. Dec. 155, A. v. X. for the negligent burning of buildings by sparks from a locomotive engine run by X. but not identified. A. offers to show that shortly before the fire a witness had seen sparks and fire thrown from the engines used by X. on its road, and, after passage of an engine, had picked up lighted coals over two inches in length. In respect to the competency of this evidence the court says: "It is competent prima facie evidence for a person seeking to establish the responsibility of the company for a burning upon the track of the road, after refuting every other probable cause of the fire, to show that about the time when it happened the trains which the company was running past the location of the fire were so managed, in respect to the furnaces, as to be likely to set on fire objects not more remote than the property burned. The effect of the evidence would only be to shift the onus probandi upon the company, and that, under the circumstances of this case, seems to me to be unavoidable. For instance, if it were proved to be universally true that the engines on the defendant's road scattered fire upon both sides, so as to endanger property as near the track as this building was, and it was established, as was done in this case, that the property claimed to have been set on fire by the negligence of the defendants was actually burned, without any known

proceeded upon the theory that the evidence was admissible as showing the possibility that the defendant's engines could have set the fire, but not admissible for the purpose of showing defendant's negligence.[23] There is another distinction also to be made between cases where a particular engine is identified and charged with setting the fire and cases where the fire is charged generally against the defendant, but the particular engine is unknown. In the latter case, evidence as to the manner in which any engine of the company operated is admissible; while in the former case some authorities hold that, the charge of negligence being confined to a single engine, the evidence must be confined to that particular engine.[24] It would seem, however, that in either case the evidence ought to be admitted on the question of the possibility of communication of fire; and if there is any merit in the doctrine frequently laid down that in the operation of a railroad a unity of management and similarity in construction of the appliances used is to be presupposed, the evidence would seem admissible also upon the point of negligence.[25]

cause or circumstance of suspicion besides the engines, it would clearly be incumbent on the defendants to show that they were not the cause." To the same effect are Grand Trunk R. Co. v. Richardson, 91 U. S. 454, 23 L. Ed. 356; Northern Pac. R. Co. v. Lewis, 7 U. S. App. 254, 2 C. C. A. 446, and 51 Fed. 658; Green Ridge R. Co. v. Brinkman, 64 Md. 52, 20 Atl. 1024, 54 Am. Rep. 755; Jacksonville, T. & K. W. Ry. Co. v. Peninsular Land, Transp. & Manuf'g Co., 27 Fla. 1, 75, et seq., 9 South. 661, 17 L. R. A. 33, 65, and all the cases cited under preceding note.

[23] In Smith v. Railroad Co., 10 R. I. 22, it was held that evidence of previous fires having been set by defendant's engine was admissible on both questions, but that evidence of subsequent fires was only admissible on the question of the possibility of communicating fire. That evidence of the condition of an engine, and the emission of sparks on prior occasions, is admissible only for the purpose of showing the possibility of the communication of fire, is held in Edwards v. Navigation Co., 39 Q. B. U. C. p. 264.

[24] Patton v. Railway Co., 87 Mo. 117, 123, 56 Am. Rep. 446.

[25] In Grand Trunk R. Co. v. Richardson (1875) 91 U. S. 454, 23 L. Ed. 356, A. sued X. for destruction of A.'s sawmill by fire alleged to have been communicated by X.'s engine. The evidence showed that the fire was caused by one of two engines. Is testimony that engines of X., at various times during same season before fire occurred, scattered fire along where plaintiff's mill was, without showing that either

PROOF AS TO KINDS OF APPLIANCES USED BY OTHERS IN SAME LINE.

113. Where the negligence charged consists of the use of defective or dangerous machinery or appliances, evidence that safer and better appliances are used by others in the same line of business is admissible to show the jury what was available for use by the defendant, and thus, with the other circumstances, enable them to determine whether he was negligent in using the appliances causing the damage.

Where the question of negligence relates to the use of mechanical appliances, the case is an even stronger one for the admission of this class of evidence than the cases under the preceding head. The only method the jury will have of determining the question is by reference to what appliances are the safest and best for the purpose for which defendant uses them. To learn what are the safest and best, the jury must inquire from those skilled in such matters. Such witnesses may state that the appliances used by defendant were unsafe. This does not help to a solution of the question of negligence, unless it also appear that there are other appliances available for the defendant's purpose which are more safe, and which, as a reasonably prudent person, he should have known about, and have procured. Now, it is precisely on this point that the evidence as to what appliances are in use by other persons in similar lines becomes material. If it appear that a safer and better appliance was in common use at the time defendant was using an inferior one, the jury may well infer that the defend-

of those which the plaintiff claimed communicated the fire was among the number, and without showing similarity of construction, repair, or management, admissible? The court say: "The question has often been considered by the courts in this country and in England, and such evidence has, we think, been generally held admissible, as tending to prove the possibility, and a consequent probability, that some locomotive caused the fire, and as tending to show a negligent habit of the officers and agents of the railroad company." The fact that one of two particular engines was charged with setting the fire did not, in this case, prevent the court from going to the full length of the doctrine, although it did not appear that the other fires were caused by either of the two engines in question.

ant was negligent in not procuring the better appliance.[26] In showing that a safer and better appliance is in common use, and thus available to defendant, it will usually be necessary, and there can be no objection to showing it by separate witnesses, each of whom may be able to testify as to a single case.

In some cases, perhaps more often in those where questions of negligence are involved, experiments or artificial reproduction of conditions and happenings are offered for the purpose of throwing light upon the nature and results of the actual happening in connection with which negligence is alleged. It is a prerequisite to the admissibility of such experiments that they be performed under conditions similar to those which attended the original event. Given similar conditions, however, and there seems to be no good reason why such experiments may not furnish a basis for strong logical inference respecting the facts in the case, and the courts have usually held that under these conditions such evidence is admissible.[27]

EVIDENCE OF ONE CRIME NOT ADMISSIBLE TO PROVE ANOTHER.

114. Evidence of the commission of a crime other than the one charged is not admissible to prove the guilt of the accused.

However bad a person may be, however guilty of crime, it is nevertheless a principle in our system of administering jus-

[26] The question of the admissibility of this class of evidence arose in the case of Carley v. Railway Co., 48 Hun, 619, 1 N. Y. Supp. 63. The charge was that the defendant used a dangerous and defective spark arrester. A witness who qualified as an expert was asked as to the kind of spark arresters used on the West Shore road at the time, and was permitted to testify that a different and safer pattern of spark arrester was used by such road. On appeal the court say: "The plaintiff had a right to show, if she could, that the appliance used by the defendant was not a reasonably safe and suitable appliance; and, to that end, evidence that better appliances were in common use upon another road in the same vicinity was competent."

[27] Krueger v. Manufacturing Co. (Tex. Civ. App.) 85 S. W. 1156. But the courts are strict with respect to requiring conditions to be proved to have been similar before admitting the evidence. Chicago & E. I. Ry. Co. v. Crose, 214 Ill. 602, 73 N. E. 865, 105 Am. St. Rep. 135.

tice that a conviction and punishment under the law must be for some specific act or crime proved against him by competent evidence compelling an inference of guilt as to such specific act, and not for a general criminal depravity or wickedness. The commission of one crime or of a series of crimes different from the one charged may tend to show that the accused is a bad man, and thus make the inference easy that he might have committed the crime charged; but it does not compel a logical inference that he did in fact commit it. The effect of such evidence, if admitted, would invariably be to prejudice the jury against the accused, and divert their minds from an impartial consideration of the evidence as to the particular crime charged. It is therefore excluded.[28]

[28] People v. McLaughlin, 150 N. Y. 365, 44 N. E. 1017, 1022–1025: In this case the defendant, a police captain, was accused of extortion, in having illegally obtained $50 from one S. by means of threatened interference with certain work S. was performing, in removing some old buildings. It appeared that the $50 was obtained from S., not by the defendant personally, but by one B., a subordinate under the defendant. Evidence on the trial was offered and admitted showing that on other occasions the defendant had obtained, by similar illegal means, money from other persons through the said subordinate, B. The court of appeals held this erroneous, saying (page 386 of 150 N. Y., page 1023 of 44 N. E.): "It is an elementary principle that the commission of one crime is not admissible in evidence to establish the guilt of a party of another. But, if the evidence is material and relevant to the issue, it is not inadmissible simply because it tends to prove the defendant guilty of another crime. * * * There is, we think, a clear and important distinction between allowing evidence of the commission of another crime to show motive, intent, or guilty knowledge, or where the crime proved is an incident to, a part of, or leads up to, the crime with which a defendant is charged, and a case where the crime proved is entirely independent of, and disconnected with, the crime alleged to the indictment. * * * Manifestly, this evidence [the evidence of other crimes in the case at bar] was not admitted to prove guilty knowledge, intent, motive, or notice; nor did the transactions thus proved have any relation to or connection with the transaction upon which the indictment was based. They were entirely distinct and separate, had with other persons, at other times, under different circumstances, and constituted different crimes. They formed no link in the chain of circumstances or facts which led up to the transaction involved, and were no part of it. We think this evidence did not fall within any exception to the general rule, and was therefore improperly received."

People v. Collins, 144 Mich. 121, 107 N. W. 1114. In this case the

PROOF AS TO INTENT, MOTIVE, OR PHYSICAL OR MENTAL STATE.

115. Where the question is as to knowledge, intent, motive, or any bodily or mental state, evidence of other acts done, showing the existence of such knowledge, intent, motive, or bodily or mental state, are admissible, even though it involves the proof of other crimes.

Evidence admitted under this principle, in its effect, must be carefully confined within the limits for which it is admitted. The commission of one crime has no bearing as tending to prove the commission of another, but the commission of a series of crimes of the same nature may have a bearing in showing a guilty knowledge.[29] Where the crime charged is receiving stolen goods, the possession of counterfeit money, or the like, the knowledge of the accused person becomes one of the material facts in issue, and other acts of similar nature are admissible.[30] So, also, on the question of malice, evidence

accused was charged with murdering by arsenic poison a member of her household. It was held that evidence that another member of the household had recently died from arsenic poisoning was not admissible as evidence that there was arsenic in the house. The exclusion of the evidence was put squarely on the ground that it was not relevant upon the issue which it was offered to prove. For a suggestive note on this subject, see 11 Harvard Law Rev. 189.

[29] In Reg. v. Francis (1874) L. R. 2 Crown Cas. 128, upon the indictment of X. for obtaining money by false pretenses, by representing a ring to be a diamond ring, evidence was offered, in order to prove guilty knowledge on X.'s part, that he had, shortly before, offered other false articles to other pawnbrokers. The evidence was held admissible. Lord Coleridge, C. J., says: "It tends to show that he was pursuing a course of similar acts, and thereby it raises a presumption that he was not acting under a mistake. It is not conclusive, for a man may be many times under a similar mistake, or may be many times the dupe of another; but it is less likely he should be so often than once, and every circumstance which shows he was not under a mistake on any one of these occasions strengthens the presumption that he was not on the last; and this is amply borne out by the authorities." Miller v. State, 68 Miss. 221, 8 South. 273.

[30] Thus, in Com. v. Russell, 156 Mass. 196, 30 N. E. 763, the charge against the defendant was the uttering of a forged check, and the prosecution was permitted to show that on the occasion of his arrest he had in his possession three other checks which were forged,

of other criminal acts leading up to the one in question, which show the state of mind of the accused, is admissible.[31] In the proof of certain crimes, where motive is an important element, evidence of motive will involve the placing before the jury of a plan or scheme carried out or attempted by the accused, which may include the commission of other crimes. In such cases the proof of those other crimes is admissible.[32]

and that he had previously passed two others which were forgeries. Barker, J., says (page 197, 156 Mass., 30 N. E. 763): "The admission of such evidence is necessary, because guilty knowledge is a fact not susceptible of proof by direct evidence, and can rarely be shown by explicit admissions, but only by acts and conduct." To the same effect are Lindsey v. State, 38 Ohio St. 507, 513; People v. Marion, 29 Mich. 31, 38; State v. Minton, 116 Mo. 605, 22 S. W. 808. Upon the same principle, evidence of other instances of the receipt of stolen property from the same person is allowed, to prove guilty knowledge. Copperman v. People, 56 N. Y. 591; Shriedley v. State, 23 Ohio St. 130, 142. As to possession of counterfeit money, see People v. Farrell, 30 Cal. 316. Evidence of false representations made, for the purpose of obtaining credit, to different persons at about the same time, and in the same manner, as made to complainant, is allowed to show fraudulent intent. Mayer v. People, 80 N. Y. 364, 376; Tarbox v. State, 38 Ohio St. 581; Devoto v. Com., 3 Metc. (Ky.) 417. Other acts or crimes bearing on question of intent: New York Mut. Life Ins. Co. v. Armstrong, 117 U. S. 591, 6 Sup. Ct. 877, 29 L. Ed. 997; Continental Ins. Co. of New York v. Insurance Co. of Pennsylvania, 2 C. C. A. 535, 51 Fed. 884; People v. O'Sullivan, 104 N. Y. 481, 10 N. E. 880, 58 Am. Rep. 530; Com. v. Pipes, 158 Pa. 25, 27 Atl. 839; Com. v. Robinson, 146 Mass. 571, 16 N. E. 452; Com. v. Bradford, 126 Mass. 42; Taylor v. State, 22 Tex. App. 529, 545, 3 S. W. 753, 58 Am. Rep. 656; Hawes v. State, 88 Ala. 37, 67, 7 South. 302; Fabian v. Traeger, 215 Ill. 220, 74 N. E. 131. Previous acts of adultery with same person, as showing an adulterous disposition: Funderburg v. State, 23 Tex. App. 392, 5 S. W. 244; Hicks v. State, 86 Ala. 30, 5 South. 425.

[31] Friend v. Hamill, 34 Md. 298, 305; Grace v. McArthur, 76 Wis. 641, 651, 45 N. W. 518; State v. Palmer, 65 N. H. 216, 20 Atl. 6; Burnett v. State, 14 Lea (Tenn.) 439.

[32] Com. v. Robinson (1888) 146 Mass. 571, 16 N. E. 452. Upon the trial of X. for the murder of M., evidence was offered of a scheme by X. to kill Y., then to induce M. to make X. beneficiary under a policy under which Y. had been beneficiary, and then to kill M. Is the evidence admissible? Allen, J., says: "In such cases there is a distinct and significant probative effect, resulting from the continuance of the same plan or scheme, and from the doing of other acts in pursuance thereof. It is somewhat of the nature of threats, or

In one case A. sued X. on a note, and X. alleges that his indorsement was procured by a fraudulent trick and without any intention on his part to indorse the note. A. is a bona fide holder for value, having purchased the note from the person who obtained X.'s indorsement. X. offers evidence of the perpetration of similar tricks on other persons by those who have obtained the indorsement from him. Such evidence is admissible as showing a general scheme to defraud.[83]

The courts are not always uniform in their application of the principle upon which this class of evidence is admitted, and we find conflicting decisions. There is also a tendency not to extend the doctrine, but to confine it to cases where there is very clear reason for its application on account of the necessity of showing motive, intent, or guilty knowledge.[84]

declarations of intention, but more especially of the preparations for the commission of the crime which is the subject of the indictment. * * * Suppose, for further example, one is charged with breaking a bank, and there is evidence that he had made preliminary examinations from a neighboring room; the fact that his occupation of such room was accomplished by a criminal breaking and entering would not render the evidence incompetent." See, also, New York Mut. Life Ins. Co. v. Armstrong, 117 U. S. 591, 6 Sup. Ct. 877, 29 L. Ed. 997; Phillips v. People, 57 Barb. (N. Y.) 353, 364; State v. Wentworth, 87 N. H. 196, 211; Moline-Milburn Co. v. Franklin, 37 Minn. 137, 33 N. W. 323; Bernheim v. Dibrell, 66 Miss. 199, 203, 5 South. 693; Goersen v. Com., 99 Pa. 388, 398; State v. Reed, 53 Kan. 767, 37 Pac. 174, 42 Am. St. Rep. 322.

[83] Yakima Valley Bank v. McAllister, 37 Wash. 566, 79 Pac. 1119, 1 L. R. A. (N. S.) 1075, 107 Am. St. Rep. 823; Fabian v. Traeger, 215 Ill. 220, 74 N. E. 131; The Queen v. Rhodes, 1 Q. B. D. 77. See, also, numerous civil cases cited in preceding notes. But see, contra, Seymour v. Bruske, 140 Mich. 244, 103 N. W. 613, where it was held, in an action for the conversion of logs, that evidence of attempted conversion by defendant of logs belonging to others than plaintiff was incompetent. This case, it is believed, represents the prevailing tendency respecting this class of evidence in ordinary civil cases.

[84] Reg. v. Oddy (1851) 2 Denison, Crown Cas. 264. Upon the indictment of X. for breaking into a warehouse and stealing therein 50 yards of cloth, evidence that other pieces of cloth were found in X.'s possession, which had been stolen three months previous, is inadmissible. Lord Campbell, C. J., says: "It would not be direct evidence of the particular fact in issue, viz., that at the time of his receiving these specific articles he knew them to be stolen. The cases of uttering with a guilty knowledge certainly go very far, and I

115½. Where, however, the bodily or mental state is not a material fact in issue, evidence as to such state is inadmissible.

The fact that a person wishes or hopes to do a thing, or that the thing was done because of a particular reason, or the existence of any mental or physical condition with respect to and at the time of the doing of an act, while it may have some psychological connection with the act, and may from an analytical standpoint suggest some logical inference with respect to the act, it is not such evidence as the law recognizes as a basis for legal inference. Witnesses, therefore, cannot, in testifying as to facts, as a rule, give their motives, wishes, hopes, mental states, feelings, or physical conditions. Such evidence is generally regarded as irrelevant and of too little probative force to justify its use.[35]

should be very unwilling to apply their principle generally to criminal law." See, also, Coleman v. People, 58 N. Y. 555; Strong v. State, 86 Ind. 208, 44 Am. Rep. 292; Shaffner v. Com., 72 Pa. 60, 13 Am. Rep. 649; Billings v. State, 52 Ark. 303, 12 S. W. 574.

[35] Sampson v. Hughes, 147 Cal. 62, 81 Pac. 292; Dunbar v. Armstrong, 115 Ill. App. 549; Barnewell v. Stephens, 142 Ala. 609, 38 South. 662.

CHAPTER IX.

CHARACTER.

116. General Rule as to the Exclusion of Character Evidence.
117–118. Rule in Criminal Cases.
119. Character as a Fact in Issue.
120. Character as an Evidentiary Fact
121. Character of Witness for Veracity.
122. Character When Material—How Proved.
123. Particular Acts as Evidence of Character.
124. Opinion Inadmissible.
125. General Reputation—Proved by Direct Testimony.
126. Reputation as to Act Charged Inadmissible.
127. General Reputation Must be That Which a Person Bears in His Own Community.
128. Impeaching Evidence Introduced First.

GENERAL RULE AS TO THE EXCLUSION OF CHARACTER EVIDENCE.

116. The character of a person cannot, as a general rule, be shown for the purpose of proving his conduct.

Where the question is whether X. did or did not do a certain act, his character, if proved, might throw a strong light upon the issue, and justify an inference as to the act charged. It has been well settled, however, from the earliest period, that such evidence is not, in general, admissible either in civil or criminal cases.[1] The reason for excluding this class of evidence is its unreliability in that it may be easily affected by passion or prejudice on the part of the witness testifying, and also the danger that it may be given undue weight by the jury. It is the same spirit of fairness which concedes everything to the accused, and throws all burdens upon the accuser, that char-

[1] Attorney General v. Bowman (1791) 2 Bos. & P. 532, note a; Houghtaling v. Kelderhouse (1848) 2 Barb. (N. Y.) 149; Woodruff v. Whittlesey (1786) Kirb. (Conn.) 60, 62; Humphrey v. Humphrey (1828) 7 Conn. 117; Matthews v. Huntley (1838) 9 N. H. 146; Anderson's Ex'rs v. Long (1823) 10 Serg. & R. (Pa.) 55, 61.

acterizes the English law of evidence.[2] In many civil cases the exclusion of character evidence rests also upon the very slight value which it has to establish any fact in issue, and the danger of leading the jury into collateral inquiry which will confuse and obscure the real issues.[3]

In civil suits the attempted use of character evidence usually arises in cases of tort where there is some violent, malicious, or fraudulent element involved,[4] or in cases of contract where

[2] In Reg. v. Rowton, Leigh & C. 520, Willes, J., discussing the question, says (page 540): "It is a mistake to suppose that, because the prisoner only can raise the question of character, it is therefore a collateral issue. It is not. Such evidence is admissible because it renders less probable that what the prosecution has averred is true. It is strictly relevant to the issue; but it is not admissible upon the part of the prosecution, because, as my Brother Martin says, if the prosecution were allowed to go into such evidence, we should have the whole life of the prisoner ripped up, and, as has been witnessed elsewhere, upon a trial for murder you might begin by showing that, when a boy at school, the prisoner had robbed an orchard, and so on through the whole of his life; and the result would be that the man on his trial might be overwhelmed by prejudice, instead of being convicted on that affirmative evidence which the law of this country requires. The evidence is relevant to the issue, but is excluded for reasons of policy and humanity, because although, by admitting it, you might arrive at justice in one case out of a hundred, you would probably do injustice in the other ninety-nine."

[3] In Houghtaling v. Kelderhouse, supra, A. sued X. for slander in saying that A. had killed his (X.'s) horses, by poisoning them. X., in defense of the action, introduced evidence tending to show the truth of the charge, and, to meet this, A. offered evidence of his general good character, which was excluded. Parker, J., says (page 152 of 2 Barb. [N. Y.]): "But in a civil suit, where the personal rights of opposite parties are to be weighed in a nicely adjusted balance, no proof except that relating to the facts in controversy should be admitted to turn the scale."

[4] Evidence of good character is inadmissible in an action for trespass for assault and battery to show that defendant did not commit the act, or to rebut malice, Soule v. Bruce, 67 Me. 584; Porter v. Seiler, 23 Pa. 424, 62 Am. Dec. 341; in an action for damages for false representations, Gough v. St. John, 16 Wend. (N. Y.) 646; for wrongfully killing plaintiff's husband, Vawter v. Hultz, 112 Mo. 633, 639, 20 S. W. 689; nor in an action for damages for homicide, where self-defense is set up, Morgan v. Barnhill, 118 F. 24, 55 C. C. A. 1. Evidence of the bad character of the plaintiff is not admissible in mitigation of damages in an action of assault and battery, Corning v. Corning,

fraud is charged.[5] Many times in such cases the question of the commission of a criminal act arises, but it is uniformly held that this is no ground for the admission of character evidence.[6] The question of negligence is responsible for many cases where it has been sought to introduce this species of evidence. Showing the act of negligence in issue by proving general carelessness and unskillfulness is a favorite method, as is also disproving negligence by proving great skill.[7] It seems

6 N. Y. 97, 104; Bruce v. Priest, 5 Allen (Mass.) 100; nor in an action for seduction of plaintiff's daughter, Dain v. Wyckoff, 18 N. Y. 45, 72 Am. Dec. 493.

[5] Evidence of bad character of plaintiff in an action on promissory note is not admissible to show that he was not a bona fide holder, but was a party to fraud affecting the note. Battles v. Laudenslager, 84 Pa. 446. Nor is evidence of good character admissible to disprove charges of fraud in an attachment suit, Curtis v. Hoadley, 29 Kan. 566; nor in an equity suit to have an alleged fraudulent transaction set aside, Dudley v. McCluer, 65 Mo. 241, 27 Am. Rep. 273.

[6] Evidence of good character is not admissible in an action on a policy of insurance to rebut the charge that plaintiffs themselves burned down the buildings, American Fire Ins. Co. v. Hazen, 110 Pa. 530, 537, 1 Atl. 605 (contra, Mosley v. Insurance Co., 55 Vt. 142, 152); nor in an action for damages "for willfully, unlawfully, and maliciously burning a barn and its contents," Gebhart v. Burkett, 57 Ind. 378; nor in an action of trover for the conversion of a package of money, where the defendant is charged with embezzlement, Wright v. McKee, 37 Vt. 161. Evidence of character for honesty is not admissible in an action by plaintiff for services rendered to defendant as bookkeeper, where defendant claims that plaintiff made entries in the books without his knowledge or consent; character not being in any sense an issue in the case. Mattingly v. Shortell, 27 Ky. Law Rep. 426, 85 S. W. 215.

[7] McDonald v. Inhabitants of Savoy, 110 Mass. 49, where the plaintiff attempted to show that he was free from negligence contributing to an injury received while driving on defendant's highway, which he alleged to be defective, by evidence that he was commonly careful and skillful. Evidence of plaintiff's character for sobriety is inadmissible to meet evidence that, at the time of the injury alleged to have been caused by defendant's negligence, plaintiff was intoxicated. Carr v. Railway Co., 163 Mass. 360, 40 N. E. 185. But see Illinois Cent. R. Co. v. Prickett, 210 Ill. 140, 71 N. E. 435. In this case, which was an action for the death of an engineer on defendant's road, it appeared that the engineer and fireman were both killed by the explosion of the boiler, and there were no witnesses who observed what the engineer did immediately before the explosion.

surprising, when one considers the unanimity with which the courts hold evidence of this sort inadmissible, that the attempts to use it should be so numerous.

RULE IN CRIMINAL CASES.

117. In criminal cases evidence may be given by the accused to show such traits of character as tend to make it improbable that he would or could have committed the crime charged.

118. The introduction of such evidence by the accused opens the door for the prosecution to meet it by showing such traits as would lead to an inference of guilt. The prosecution cannot introduce the evidence unless the accused first enters upon the subject.

The rule with respect to the use of character evidence in criminal cases was in early times confined to capital offenses.[8] It arose out of a desire to give the accused person every chance, and it was considered that evidence of good character might justify an inference that the accused would not have committed the crime charged, and that therefore the crime was not in fact committed by him. The rule was subsequently extended to all criminal cases.[9] The same condition as to the accused

It was held that under these circumstances evidence as to the general reputation of the engineer as a careful and competent man, and as a sober man, was admissible as bearing on the question of his exercise of ordinary care. To the same effect see City of Chicago v. Doolan, 99 Ill. App. 143, where the party claiming damages was insane and unable to be present at the trial. And see, also, Missouri Pac. Ry. Co. v. Moffatt, 60 Kan. 113, 55 Pac. 837, 72 Am. St. Rep. 343, and comment thereon in 12 Harvard Law Rev. 568.

[8] Cancemi v. People, 16 N. Y. 501, 507.

[9] Attorney General v. Bowman (1791) 2 Bos. & P. 532, note a. Upon the trial of an information against X. for keeping false weights, and for offering to corrupt an officer, X. offered testimony as to his character. The evidence was excluded, on the ground that it was not a criminal, but a penal, action. Eyre, C. B., said: "I cannot admit this evidence in a civil suit. The offense imputed by the information is not in the shape of a crime. It would be contrary to the true line of distinction to admit it, which is this: that, in a direct prosecution for a crime, such evidence is admissible; but where the prosecution is not directly for the crime, but for the penalty, as in

taking the initiative was imposed. In fact, whenever it is sought to use character evidence, whatever the crime charged, the greatest strictness is enforced by the courts with respect to this condition. The accused must first enter upon the subject,[10] and it must be a deliberate taking up of this line of evidence. The mere fact that reference is made, in the evidence produced by the accused, to his character or certain traits thereof, is not sufficient to permit the prosecution to enter upon it.

The courts generally have refused to extend the principle beyond cases which were strictly criminal in their nature.[11] The evidence is in its nature circumstantial, and is to be given such weight as the jury think proper. It has no peculiar value beyond other circumstantial evidence, nor, on the contrary, is

this information, it is not." Com. v. Hardy (1807) 2 Mass. 317. In this case, on the trial of X. for murder, evidence as to his previous good character was offered. Parson, C. J., said that he was of the "opinion that a prisoner ought to be permitted to give in evidence his general character in all cases, for he did not see why it should be evidence in a capital case, and not in cases of an inferior degree. In doubtful cases, a good general character, clearly established, ought to have weight with the jury; but it ought not to prevail against the positive testimony of credible witnesses. Whenever the defendant chooses to call witnesses to prove his general character to be good, the prosecution may offer witnesses to disprove their testimony. But it is not competent for the prosecutor to go into this inquiry until the defendant has voluntarily put his character in issue, and in such case there can be no examination as to particular facts." The other judges "were not prepared to say that such testimony should be admitted on all criminal prosecutions, but that in capital cases it clearly might be."

[10] Hamilton v. State, 34 Ohio St. 82; People v. White, 14 Wend. (N. Y.) 111; People v. Fair, 43 Cal. 137, 149; Givens v. Bradley, 3 Bibb (Ky.) 192, 6 Am. Dec. 646. But, if the accused takes the stand as a witness, his character for veracity is subject to impeachment, the same as that of any witness. McDonald v. Com., 86 Ky. 10, 4 S. W. 687; Reg. v. Rowton, 1 Leigh & C. 520; Reg. v. Turberfield, Id. 495; Com. v. O'Brien, 119 Mass. 342, 20 Am. Rep. 325; Snyder v. Com., 85 Pa. 519; State v. Lapage, 57 N. H. 245, 24 Am. Rep. 69.

[11] Gough v. St. John, 16 Wend. (N. Y.) 646, 653; Low v. Mitchell, 18 Me. 372; Humphrey v. Humphrey, 7 Conn. 116; Day v. Ross, 154 Mass. 13, 27 N. E. 676; America Fire Ins. Co. v. Hazen, 110 Pa. 530, 1 Atl. 605. But in a recent case in New Hampshire the doctrine was held to apply where the issue in a civil action was as to the commission of a criminal act. Warner v. Warner, 69 N. H. 137, 44 Atl. 908.

its effect limited to cases where, on the other evidence, the jury are left in doubt. It is to be treated just as other circumstantial evidence, and to be considered with and as a part of the whole case.[12] Without it the other evidence might be convincing, and yet in itself it may be the foundation for that doubt which is necessary to an acquittal.[13] We many times find the proposition laid down, in substance, that where the act is one of great and atrocious criminality, and is strongly proved by the other evidence, there evidence of good character cannot avail. This is erroneous as a statement of a principle. What is in the mind of the court is, without doubt, that, under such circumstances, evidence of previous good character would be of little weight. The very fact that it is competent to go to the jury shows that it may avail.[14]

[12] Remsen v. People, 43 N. Y. 6; Stover v. People, 56 N. Y. 315, 319; U. S. v. Gunnell, 5 Mackey (D. C.) 196; Com. v. Cleary, 135 Pa. 64, 82, 19 Atl. 1017, 8 L. R. A. 301; State v. Rodman, 62 Iowa, 456, 17 N. W. 663; State v. Spendlove, 47 Kan. 160, 168, 28 Pac. 994.

[13] People v. Moett, 23 Hun (N. Y.) 60, 65; State v. Daley, 53 Vt. 442, 446, 38 Am. Rep. 694; Stewart v. State, 22 Ohio St. 477, 485; Armor v. State, 63 Ala. 173.

[14] In Com. v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711, the court falls into this inaccurate method of statement. At page 325 of 5 Cush. (Mass.) it is said: "But, where it is a question of great and atrocious criminality, the commission of the act is so unusual,—so out of the ordinary course of things, and beyond common experience; it is so manifest that the offense, if perpetrated, must have been influenced by motives not frequently operating upon the human mind,—that evidence of character, and of a man's habitual conduct under common circumstances, must be considered far inferior to what it is in the instance of accusations of a lower grade. Against facts strongly proved, good character cannot avail." That the real question is merely one of weight of evidence was understood, as the following language on the same page shows: "But still, even with regard to the higher crimes, testimony of good character, though of less avail, is competent evidence to the jury, and a species of evidence which the accused has a right to offer." See Cancemi v. People, 16 N. Y. 501, 505–507, for a very clear statement of the effect of character evidence. In Mississippi the courts have held to the doctrine "that good character avails defendant only in a doubtful case," and have held the evidence inadmissible unless the guilt of the accused on the other evidence is doubtful. McDaniel v. State, 8 Smedes & M. (Miss.) 401, 416, 47 Am. Dec. 93; Chase v. State, 46 Miss. 683, 707; also, in Tennessee, Bennett v. State, 8 Humph. (Tenn.) 118, 125; and in Florida,

It is to be observed that, where character evidence is admissible, there is a limit to the sort of evidence which will be received. A person's character is made up of many different traits. One trait, for example, that he is a passionate, quick-tempered person, may properly lead to an inference that he might have committed some crime of violence charged against him, while it would have no bearing upon the question of whether he had been guilty of a larceny or forgery. Hence it is that proof of character, where it is allowed, should be, and is generally, confined to those particular traits which have some logical connection with the nature of the offense charged.[15]

It is needless to dwell on the fact that the character proved must be character prior to the time of the commission of the offense. This is implied from the very purpose for which the evidence is admitted.[16]

CHARACTER AS A FACT IN ISSUE.

119. Where the nature of the case is such that character becomes one of the principal facts in issue, evidence to prove it is admissible.

This is not a real exception to the rule which excludes character evidence. It is merely an application of the ordinary rule as to the proof of facts in issue. To shut out evidence of character under such circumstances would be to say to the party, "We will not permit you to prove your case." Instances of this sort are most frequently met with in actions for libel

Long v. State, 11 Fla. 295. This statement of the doctrine is also found in 4 Starkie, Ev. (2d Am. Ed.) 365. The language of the court's charge in People v. Mead, 50 Mich. 228, 15 N. W. 95, approved by the court, on appeal, if given a natural construction, is in line with the doctrine which has been generally disapproved; yet, in approving the charge, the appellate court makes the statement (page 233 of 50 Mich., page 95 of 15 N. W.) "that an accused party, who is of good reputation, is entitled to the benefit of it in all cases."

[15] Griffin v. State, 14 Ohio St. 55, 63; Drew v. State, 124 Ind. 9, 17, 23 N. E. 1098; State v. Curran, 51 Iowa, 112, 117, 49 N. W. 1006; People v. Fair, 43 Cal. 137, 148; State v. King, 78 Mo. 555.

[16] Shewalter v. Bergman, 123 Ind. 155, 23 N. E. 686.

and slander. In these cases the wrong complained of is usually an injury to reputation by reason of words spoken or written by defendant which it is alleged falsely impute to the plaintiff some criminal act. A plaintiff, when he comes into court with a suit for libel, ordinarily bases his claim for damages on these facts: (1) That the defendant made the libelous statement; (2) that it is false; (3) that he has been damaged thereby. If the defendant justify the utterance of the alleged libelous words by alleging the truth of the facts stated,—i. e., that the plaintiff in fact did commit the criminal act,—evidence upon the point is necessarily competent. Its effect is to prove him of bad character, but this is immaterial, as it is proof of an issue in the case. No difficulty is presented; it is not an exception to the rule which excludes proof of character, nor is it an instance of the kind above referred to where character becomes a fact in issue. It is the commission of a particular act which is the fact in issue, and not character, though proof as to the commission of the act incidentally reaches to the fact of character.[17]

Let us assume now that the first fact—the making of the alleged libelous statement—is sufficiently proved, and that

[17] Proctor v. Houghtaling, 37 Mich. 41. See Hosley v. Brooks, 20 Ill. 115, 71 Am. Dec. 252, where it was held in an action for a slander imputing unchastity to plaintiff, her character as a quarrelsome person could not be shown in mitigation. An analogous case is presented in Johnson v. People, 55 N. Y. 512. The indictment was for the crime of grand larceny after a former conviction for the same offense; the statute prescribing a greater penalty for a second offense. The defendant objected to proof of the former conviction, on the ground that it tended to establish bad character by proof of specific acts, and also that the question of character could not be gone into unless the prisoner first introduced evidence of good character. It is manifest that the evidence was entirely proper, as the commission of the previous offense and conviction therefor were directly in issue under the indictment and plea; and the court rightly said (page 514 of 55 N. Y.): "The objection that the evidence may affect the prisoner's character has no force when such evidence relates to the issue to be tried. Such evidence may be prejudicial to a prisoner as to the second offense, and a case might occur of a conviction upon too slight evidence, through the influence which a previous conviction of a similar offense might exert upon the minds of the jury; but there is no legal presumption that such a result will ever be produced."

the defendant makes no claim of the truth of such statement; there still remains to be tried the third fact, to wit, damage to the plaintiff. The ground for damages is that plaintiff, being of good character, enjoyed a good reputation, and that defendant, by his libelous statement, has detracted from that reputation. If the defendant denies that the plaintiff has been damaged, it involves a denial of the facts upon which plaintiff founds his claim. One of these facts is that the plaintiff is of good character. Character is thus put in issue as a fact in the case bearing upon the question of damage, and evidence to prove it is admissible.[18] As to the method of proof and the kind of evidence allowed, this is a distinct and different question, which will be noticed later.

With respect to the admission of this kind of evidence, it would seem that it is unobjectionable on principle. Where a plaintiff seeks damages for an injury to his reputation, or brings an action in which his recovery is in a measure dependent on his good character, he offers his character for the inspection of the court. He makes it an issue in the case, and he cannot complain if the defendant takes up the issue, and proceeds with evidence to show that it is not such a character as will help him in the recovery which he seeks.[19]

[18] Paddock v. Salisbury, 2 Cow. (N. Y.) 811; Root v. King, 7 Cow. (N. Y.) 613, 635; Parkhurst v. Ketchum, 6 Allen (Mass.) 406, 83 Am. Dec. 639; Scott v. Sampson, 8 Q. B. Div. 491, 503. But the character of the defendant is in no way in issue, and defendant cannot give evidence to show his own bad character in mitigation of damages, as bearing on the question of the impression his words would be likely to make. Hastings v. Stetson, 130 Mass. 76.

[19] Scott v. Sampson (1882) 8 Q. B. Div. 491: A. against X. for libel. The question is whether evidence relating to the bad character of the plaintiff is admissible. Cave, J., says: "He complains of an injury to his reputation, and seeks to recover damages for that injury; and it seems most material that the jury who have to award those damages should know, if the fact is so, that he is a man of no reputation. On principle, therefore, it would seem that general evidence of reputation should be admitted; and, on turning to the authorities previously cited, it will be found that it has been admitted in a great majority of those cases, and that its admission has been approved by a great majority of the judges who have expressed an opinion on the subject." Bathrick v. Tribune Co., 50 Mich. 629, 640, 16 N. W. 172, 45 Am. Rep. 63.

The character of a party is sometimes brought in issue in actions of contract. In an action for breach of promise of marriage the defendant may justify the breach upon the ground that he discovered the plaintiff to be of unchaste character, and therefore he refused to marry her. Where bad character is relied on as a complete defense, and is so pleaded, it becomes one of the main facts in issue. As such, evidence must be allowed to show it.[20]

The question has arisen sometimes whether a man's character is drawn in issue in a civil action, where allegations of fraud are made. It was held in some of the earlier cases that, even though the charge was of constructive fraud, character was put in issue.[21] But the better opinion is that evidence of character is not admissible in this class of cases.[22] Attempts have been made in certain civil cases, where better evidence cannot be obtained, to get in evidence as to character. The courts have, however, generally held that this is no ground for its admission.[23]

[20] Burnett v. Simpkins, 24 Ill. 264. See, to the effect that character is not put in issue where the defendant relies on particular acts of unchastity as evidence in mitigation of damages, Leckey v. Bloser, 24 Pa. 401, 407.

[21] Ruan v. Perry, 3 Caines (N. Y.) 120, but this case was overruled later by Gough v. St. John, 16 Wend. (N. Y.) 646.

[22] 1 Greenl. Ev. § 55; American Fire Ins. Co. v. Hazen, 110 Pa. 530, 537, 1 Atl. 605; Givens v. Bradley, 3 Bibb. (Ky.) 192, 6 Am. Dec. 646; Powers v Armstrong, 62 Ark. 267, 35 S. W. 228.

[23] In Chase v. Railroad Co., 77 Me. 62, 52 Am. Rep. 744, plaintiff sought to recover for death of X., and, in the absence of any testimony as to the accident, no one having seen it, offered evidence of the general character of X. for carefulness. The testimony was admitted, but on appeal this was held erroneous; and it is laid down in the opinion of the court (page 65) that "it is not a ground for the admission of this evidence that the plaintiff can produce no other. It is neither of primary nor secondary importance; it is not evidence at all." In support of the same principle are McDonald v. Inhabitants of Savoy, 110 Mass. 49; Bryant v. Railroad Co., 56 Vt. 710; Morris v. Town of East Haven, 41 Conn. 252; Hays v. Millar, 77 Pa. 238, 18 Am. Rep. 445; Southern Kansas R. Co. v. Robbins, 43 Kan. 145, 23 Pac. 113. In Chicago, R. I. & P. Ry. Co. v. Clark, 108 Ill. 113, where there was no one present at the time of the accident which caused death, evidence was admitted that the deceased was habitually prudent, cautious, and temperate, expressly upon the ground of im-

CHARACTER AS AN EVIDENTIARY FACT.

120. In certain cases, where a mental state or condition is a material fact in issue, and where character has a peculiarly convincing quality as an evidentiary fact, character evidence is held admissible.

This class of cases presents a real exception to the general rule against character evidence, and it includes a variety of cases, both civil and criminal. The common element in all the cases is that some mental condition is involved in the issues, which is difficult of direct proof, and on which character will shed a strong light. Take the case of a charge of rape as an illustration. One of the elements in the charge is the lack of consent on the part of the complainant. Its proof, so far as direct testimony is concerned, is difficult, being ordinarily confined to testimony of the accused on the one hand, and the complainant on the other. If it can be shown that the character of the complainant for chastity is bad, the inference is a strong one that the act charged was with her consent, as it is in line with inclinations which, from her character as proved, she may be assumed to have had. In a case like this the courts admit character evidence.[24]

In other cases, too, character may be drawn into issue as an evidentiary fact. Upon an indictment for adultery, the prosecution, after showing defendant's presence with a woman un-

possibility of other proof. It is said (page 117 of 108 Ill.): "Had there been witnesses who saw the infliction of the injury, the jury could then have determined from such evidence whether he was careful or negligent, and in such a case this evidence would not be admissible. When there are no witnesses to describe such an occurrence, the defendant would surely have the right to prove the person was habitually rash, imprudent, and intemperate to repel the presumption that he was in the exercise of proper care at the time he received the injury."

[24] Com. v. Kendall, 113 Mass. 210, 18 Am. Rep. 469; State v. Reed, 39 Vt. 417, 94 Am. Dec. 337. In Mitchell v. Work, 13 R. I. 645, it was held that evidence of unchaste character, both by general reputation and by specific acts, was admissible upon the question of damages. In these cases it is character in respect to chastity which may be proved, and not general character. State v. Morse, 67 Me. 428.

der suspicious circumstances, may, for the purpose of leading to the inference that adultery took place, show that the woman is a prostitute; and, to rebut the inference that adultery took place, the defendant may show that the woman's character for chastity is good.[25] It has also been held that the action for malicious prosecution presents a proper field for character evidence upon the question of lack of reasonable and probable cause, the inference being from the fact that plaintiff's character was bad, that the defendant acted from reasonable motives.[26]

CHARACTER OF WITNESS FOR VERACITY.

121. The character of a witness for veracity may be shown for the purpose of affecting the weight of his testimony.

Character sometimes becomes an issue in a case in a purely collateral way, and not as evidentiary of any of the main facts. This is the case where it is sought to impeach the testimony of a witness, by showing his character for veracity to be bad. The testimony having been given, and the jury asked to believe the witness, it becomes a question as to how much weight shall be given to his statements. On this point his general character for veracity becomes material, and it is accordingly held that evidence may be given to show that it is bad;[27] and, if such testimony is given, counter evidence may be given by the party producing the witness in support of his character. This is not a real exception to the general rule excluding character evidence, as it is here introduced not as in any way bearing upon the facts in issue, or showing the probability of their

[25] Com. v. Gray, 129 Mass. 474, 37 Am. Rep. 378. See, also, Orange v. State (Tex. Cr. App.) 83 S. W. 385.

[26] Martin v. Hardesty, 27 Ala. 458, 62 Am. Dec. 773. But in an action for assault and battery evidence will not be allowed that the plaintiff is of bad repute, and was accompanied by his paramour when he entered defendant's house, in ejecting him from which the assault was committed. Bruce v. Priest, 5 Allen (Mass.) 100.

[27] Knode v. Williamson, 17 Wall. 586, 21 L. Ed. 670; Cowan v. Kinney, 33 Ohio St. 422, 429; Boon v. Weathered's Adm'r, 23 Tex. 675; People v. Methvin, 53 Cal. 68.

existence, but only for a collateral purpose, connected with the weight of the testimony.

In cases of impeachment of witnesses, it is only a particular phase of character which is in issue, namely, veracity. The inquiry, therefore, cannot be extended to general character,[28] though there are a few cases in which it has been allowed.[29] And in a case for rape it has been held that character of the complainant for unchastity may be proved to affect her credibility.[30]

CHARACTER WHEN MATERIAL—HOW PROVED.

122. Where character is held to be a material fact in issue, either as a principal fact, an evidentiary fact, or a collateral fact, proof in respect to it is generally confined to testimony of general reputation.

Character has sometimes been defined as meaning, in the legal sense, "the general reputation of a person." [31] It is believed that the more correct view is that character, in the legal sense, means the same as it does in the ordinary sense, and that, where character is in issue in any one of the ways above stated, it is real character or nature, as distinguished from reputed character or "general reputation," which is the subject of inquiry. This view is more in accord with the principle of

[28] U. S. v. Vansickle, 2 McLean, 219, Fed. Cas. No. 16,609; President, etc., of Quinsigamond Bank v. Hobbs, 11 Gray (Mass.) 250; Sargent v. Wilson, 59 N. H. 396; State v. Morse, 67 Me. 428; French v. Sale, 63 Miss. 386, 393; Craig v. State, 5 Ohio St. 605; Warner v. Lockerby, 31 Minn. 421, 18 N. W. 145, 821.

[29] State v. Boswell, 2 Dev. (N. C.) 209; Smithwick v. Evans, 24 Ga. 461. In some states the decisions under special statutory provision hold that general moral character may be given in evidence to affect credibility. Walton v. State, 88 Ind. 9, 19; State v. Egan, 59 Iowa, 636, 13 N. W. 730. See, also, People v. Markham, 64 Cal. 157, 163, 30 Pac. 620, 49 Am. Rep. 700.

[30] Camp v. State, 3 Ga. 417, 420.

[31] Steph. Ev. art. 56. Greenleaf speaks of it as "general character." Chamberlayne, in his notes to Best on Evidence (8th Ed. p. 256) defines it more accurately, as follows: "By character in this connection is meant such portion of a man's actual nature and disposition as is relevant to the subject under investigation."

the cases, and explains more satisfactorily many cases which would otherwise seem anomalies.

By a singular rule, however, the evidence by which character is allowed to be proved is confined to testimony of the general reputation of the person, whose character is in question, in the community where he is known. General reputation thus becomes the basis of an inference as to the real character of the person.[32] A good reputation presumes a good character and a bad reputation presumes a bad character. But since character is what a man is,[33] and reputation is what he is supposed to be, it may happen that his reputation will be different from his character. Though in truth a man of bad character, he may be a man of good reputation. The law, as a general rule, seems to look no further than reputation for its proof of character, and to assume that reputation is a criterion upon which so much reliance may be placed that further proof is unnecessary. A witness may go on the stand with an intimate personal knowledge of the character of the person under discussion, as well as a knowledge of what is the general reputation of such person. He can state only the general reputation, and, though his direct testimony as to character might be much more valuable, the rigorous rule of law excludes it.[34] As the authorities hereafter referred to will show, whether it be evidence of bad character which the nature of the case calls for, or of good character, and whether it be given in the first instance, or to rebut previous evidence given by the opposite party, the rule is the same with regard to its being confined to

[32] The question is very fully discussed in Reg. v. Rowton (1865) Leigh & C. 520; and, though the court was divided, a majority held that the law was too well settled, confining evidence of character to testimony concerning general reputation, to admit a change. Holsey v. State, 24 Tex. App. 35, 5 S. W. 523.

[33] According to the Century Dictionary character is "the combination of properties, qualities, or peculiarities which distinguishes one person or thing, or one group of persons or things, from others; specifically the sum of inherited and acquired ethical traits which give to a person his moral individuality."

[34] Swift, Ev. 143: "A witness called to impeach or support the general character of another is not to speak of his private opinion or of particular facts in his own knowledge, but he must speak of the common reputation among his neighbors and acquaintances."

general reputation. Nor is there any difference in the rule by reason of the purpose for which character is sought to be proved, whether it be in a criminal case, or in a civil, and whether to mitigate damages or to impeach a witness.

Let it be supposed that the character of X. is in issue; from a logical standpoint there are several ways in which it may be proved. In the first place, there is testimony of X.'s general reputation, which is undoubtedly a strong fact. Secondly, there is the direct testimony of persons who have known X. intimately, and are competent to speak as to his character. Thirdly, there is the evidence of particular acts or conduct which would undoubtedly tend to show what manner of man he is. We take these three kinds of evidence up in inverse order.

SAME—PARTICULAR ACTS AS EVIDENCE OF CHARACTER.

123. Particular acts are inadmissible to show either good or bad character.

The reason for this rule is not difficult to find. It lies in the disinclination of the court to mix up with the issue before it for trial other issues as to collateral facts, which will prolong the trial, and confuse the jury, without being productive of any valuable results in the way of proof. If the court should go into an inquiry as to the commission of some one particular act on the question of character, it must, in justice to both sides, extend the inquiry to as many other acts as either side may wish to prove. In fact, a single act would be of little weight in determining character, compared to many acts extending over a considerable part of a man's life. Courts cannot go into so minute an inquiry, and therefore reject this method of proof altogether as the safer way.[85] It is assumed

[85] Scott v. Sampson, 8 Q. B. Div. 491, 505; Holmes v. Jones, 147 N. Y. 59, 68, 41 N. E. 409, 49 Am. St. Rep. 646; Miller v. Curtis, 158 Mass. 127, 131, 32 N. E. 1039, 35 Am. St. Rep. 469; Proctor v. Houghtaling, 37 Mich. 41. In Gore v. Curtis, 81 Me. 403, 17 Atl. 314, 10 Am. St. Rep. 265, which was an action for indecent assault,—the court say (page 405 of 81 Me., page 315, of 17 Atl.): "Persons seeking damages in actions of this sort must be prepared to defend their

OPINION INADMISSIBLE.

124. Direct testimony as to character would amount simply to the opinion of the witness testifying as to the character under discussion, and is inadmissible.

It has been mentioned above that, in the proof of character, direct evidence will not be allowed. This is laid down as the general rule; yet there are jurisdictions in which, under certain circumstances and in certain classes of cases, it is permitted to inquire of the witness directly as to character. In cases where the character of a witness for veracity is sought to be impeached, it is held in England and in most of the states that, after inquiry as to general reputation for veracity, the impeaching witness may be asked for his own opinion,[39] though in other jurisdictions the inquiry is confined strictly to general reputation.[40] In a case for rape it has been held that direct evidence as to immoral character was admissible.[41]

Rhode Island it is held that specific acts of immorality with other men cannot be shown in criminal cases, though they can in civil. State v. Fitzsimon, 18 R. I. 236, 27 Atl. 446, 49 Am. St. Rep. 766.

[39] In Chase's note to Stephen's Digest of Evidence (page 233) the rule is stated as follows: "It is a well-settled rule in this country that a witness of the adverse party may be impeached by evidence from other persons of his bad general reputation in his own community. The impeaching witnesses must come from this community, and, in examining any one of them, the form of inquiry usually is to ask (1) whether he knows the general reputation in that community of the witness in question; then, if he assents, (2) what that reputation is; and (3) whether from such knowledge he would believe such witness on his oath." That inquiry may extend to the question of belief of witnesses under oath after examination as to knowledge of general reputation, see Bogle's Ex'rs v. Kreitzer, 46 Pa. 465; Ford v. Ford, 7 Humph. (Tenn.) 92, 101; Hamilton v. People, 29 Mich. 173, 186. But evidence as to general reputation must first be given. Sloan v. Edwards, 61 Md. 89, 102; Lyman v. City of Philadelphia, 56

[40] Inhabitants of Phillips v. Inhabitants of Kingfield 19 Me. 375, 36 Am. Dec. 760. See Walton v. State, 88 Ind. 9, 19.

[41] Woods v. People, 55 N. Y. 515, 14 Am. Rep. 309. In this case evidence that the prosecutrix was in the habit of receiving men at her house for promiscuous intercourse was held admissible. This is going outside of the rule which requires character to be proved by general reputation only. See, also, Carter v. Com., 2 Va. Cas. 169.

GENERAL REPUTATION—PROVED BY DIRECT TESTIMONY.

125. General reputation as an evidentiary fact can only be proved by direct testimony of witnesses having knowledge of the subject. Particular reports and rumors are inadmissible.

While general reputation consists of the unanimity of individual belief, opinion, and speech concerning the character in question, and finds expression in particular rumors and reports, such particular rumors and reports are incompetent to prove general reputation. General reputation is a fact which must be directly testified to.[42] It is a fact which may be used

Pa. 488, 502. It has been held that, in the case of a witness called to rebut impeaching testimony, testimony by him to the effect that he never heard the witness' character for veracity questioned or spoken of, and that he knew the associates and neighbors of the witness, is virtually evidence of good reputation, and sufficient to permit him to testify that he would believe him under oath. People v. Davis, 21 Wend. (N. Y.) 309, 315; Lenox v. Fuller, 39 Mich. 268, 272. The question as to whether witness would believe the person whose testimony is being impeached under oath seems to be allowed, not so much for the sake of getting at an opinion, as for the sake of emphasizing and giving point to the general testimony of the impeaching witness, as testimony relating to character for veracity, and not general moral character. In Hamilton v. People, 29 Mich. 173, 185, there is a full discussion of the subject. See, also, Knight v. House, 29 Md. 194, 96 Am. Dec. 515; Wilson v. State, 3 Wis. 798. It is not, however, held to be essential to impeaching testimony that the question be asked. People v. Tyler, 35 Cal. 553; Wright v. Paige, * 42 N. Y. 581; Laclede Bank v. Keeler, 109 Ill. 385, 389.

[42] In Bush v. Prosser, 11 N. Y. 347, Selden, J. (page 361), says: "It has long been settled in this state and in Massachusetts, as well as most of the other states, that, although evidence is admissible to prove the general character of the plaintiff to be bad, yet that no mere reports or rumors, not amounting to proof of general character, nor information obtained by the defendant from others as to the truth of the charge, unless accompanied by proof that such information is true, can be received for the purpose of rebutting the presumption of malice." The word "character" seems to be used here as meaning reputation. Scott v. Sampson, 8 Q. B. Div. 491, 503; Com. v. Lawler, 12 Allen (Mass.) 585; Knight v. Foster, 39 N. H. 576; White v. Com., 96 Ky. 180, 28 S. W. 340.

as evidence of character, or perhaps of some other thing,[43] and one must discriminate between its uses. We are concerned with it here only as evidence of character, and hence may eliminate other cases.

REPUTATION AS TO ACT CHARGED INADMISSIBLE.

126. Proof of the general reputation of a party for having committed the particular act charged in an alleged libelous statement is not such proof of general reputation as is admissible on the question of character.

If the libel charges the plaintiff with having committed a theft, proof that the plaintiff is generally reputed to have committed such theft is inadmissible.[44] Reputation for a particular act is not general reputation, nor would the evidence be admissible on the question of the truth of the charge.[45] But, if proof should be offered that the plaintiff was generally reputed to be a thief,—i. e., that his general reputation in the matter of integrity was that of a thief,—it would be legitimate proof of general reputation. It is true that it only goes to one phase of his reputation; but, if his reputation is proved in

[43] In Norfolk & W. R. Co. v. Hoover, 79 Md. 253, 29 Atl. 994, 25 L. R. A. 710, 47 Am. St. Rep. 392, the general reputation for intemperance of an employé of the railroad company was admitted as leading directly to the inference of negligence in employing him. This is an example of the fact of general reputation being evidential of something other than character.

[44] Mahoney v. Belford, 132 Mass. 393; Kennedy v. Gifford, 19 Wend. (N. Y.) 296; Pease v. Shippen, 80 Pa. 513, 21 Am. Rep. 116; Young v. Bennett, 5 Ill. 43. In Scott v. Sampson, 8 Q. B. Div. 491, Cave, J., in delivering the opinion, says (page 504): "As to the second head of evidence, or evidence of rumors and suspicions to the same effect as the defamatory matter complained of, it would seem that, on principle, such evidence is not admissible, as only indirectly tending to affect the plaintiff's reputation. If these rumors have, in fact, affected the plaintiff's reputation, that may be proved by general evidence of reputation. If they have not affected it, they are not relevant to the issue." Contra, Case v. Marks, 20 Conn. 248; Fuller v. Dean, 31 Ala. 654.

[45] Wolcott v. Hall, 6 Mass. 514, 4 Am. Dec. 173; Matson v. Buck, 5 Cow. (N. Y.) 499; Proctor v. Houghtaling, 37 Mich. 41, 44.

that respect, that may be sufficient to cover the trait of character which is in issue.[46]

GENERAL REPUTATION MUST BE THAT WHICH A PERSON BEARS IN HIS OWN COMMUNITY.

127. The general reputation allowed to be proved as evidence of character is that which the party bears in his own community, where he lives and is personally known to the people, and is confined to the time of the act in respect to which character becomes material.

One's reputation in a place at some distance from his home is not admissible. The law regards as valuable upon the question of character only that repute which a man has gained among those who have had opportunity for personal observation of his habits and manner of life, and who are therefore competent to form an opinion.[47] The consensus of such opinion becomes general reputation. Since character evidence is offered as proof with respect to some particular act, the time of the commission of the act fixes the period to which testimony of character must be limited. It is his character at that particular time, and hence, as proof of character, his reputation

[46] Clark v. Brown, 116 Mass. 504, 509; Drown v. Allen, 91 Pa. 393.

[47] Com. v. O'Brien, 119 Mass. 342, 20 Am. Rep. 325; People v. White, 14 Wend. (N. Y.) 111; Waddingham v. Hulett, 92 Mo. 528, 5 S. W. 27. A man may acquire a reputation in one place, and move to another. Upon the question as to his veracity his reputation in the former community will be received where he has been but a few weeks in the new community. Louisville, N. A. & C. Ry. Co. v. Richardson, 66 Ind. 43, 50, 32 Am. Rep. 94; Kelly v. State, 61 Ala. 19; Coates v. Sulau, 46 Kan. 341, 26 Pac. 720. But reputation at a previous place of residence five years before trial is inadmissible. State v. Potts, 78 Iowa, 656, 43 N. W. 534, 5 L. R. A. 814. See Brown v. Perez, 89 Tex. 282, 34 S. W. 725, where, on account of witness having had no fixed place of abode for some time, evidence of his reputation at his former place of residence was allowed. An impeaching witness need not come from the same immediate neighborhood. If he knows the reputation of the witness whose credibility is questioned, it is sufficient. Wallis v. White, 58 Wis. 26, 15 N. W. 767. A person sent specially to a community to ascertain the reputation of a party cannot testify as to general reputation. Such evidence would be hearsay. Douglass v. Tousey, 2 Wend. (N. Y.) 352, 20 Am. Dec. 616.

at that time, which is material. His subsequent reputation will not be admitted.[48] In the case of proof of character for veracity, however, it is held that evidence of reputation after the witness' testimony has been taken by deposition is admissible.[49]

IMPEACHING EVIDENCE INTRODUCED FIRST.

128. In all cases where character becomes material, except character of the accused in criminal cases, impeaching evidence must first be introduced before evidence of good character will be received.

It is said that good character will be presumed by the court, which is not exactly the correct manner of stating, that, until character is attacked, it will be assumed by the court to be that of the normal man, sufficient to entitle his testimony, if he is a witness, to the weight which its nature and the circumstances warrant, and, if he is a plaintiff, to entitle him to the full benefit of the legal remedies which fit his case. In criminal cases, where it is the character of the accused which is in question, we have already seen that it rests with the accused to take the

[48] Mapes v. Weeks, 4 Wend. (N. Y.) 659; Com. v. Abbott, 130 Mass. 472; State v. Johnson, Winst. (N. C.) 151; Wroe v. State, 20 Ohio St. 460, 472; Graham v. State, 29 Tex. App. 31, 13 S. W. 1013. But see Parkhurst v. Ketchum, 6 Allen (Mass.) 406, 83 Am. Dec. 639, where evidence of bad reputation 10 years before, and at another place, was allowed, on the theory that reputation would be presumed to continue the same. See, also, Jones v. State, 104 Ala. 30, 16 South. 135. A period of 30 years has, however, been held to be too long to justify admission of evidence as to a party's reputation for truth and veracity. Daugherty v. Lady (Tex. Civ. App.) 73 S. W. 837.

[49] In Dollner v. Lintz, 84 N. Y. 669, it was held that reputation at time of trial could be inquired for, though the testimony of the discredited witness had been taken by deposition 18 months before. It is said in the opinion: "General reputation is not usually the growth of a day or a month, but results in most cases from a course of life or conduct for a period of time. Proof that the reputation of a witness is now bad might justify the jury, in the absence of countervailing evidence, in inferring, within reasonable limits as to time, that it was bad before the day of trial." Ransom v. McCurley, 140 Ill. 626, 635, 31 N. E. 119; Hamilton v. People, 29 Mich. 173, 188; Amidon v. Hosley, 54 Vt. 25.

initiative, if he sees a benefit in spreading his character before the jury; and the prosecution is not at liberty to use it to his injury, unless he first tries to use it to his own benefit. In other cases the rule is just the opposite. Evidence of good character will not be received until impeaching evidence has been first introduced.[50]

And the mere fact that there are circumstances shown in evidence which tend to cast doubts upon the veracity of a party will not be sufficient to allow the party to introduce evidence as to his reputation for truth and veracity.[51]

Suits for libel, for seduction, for criminal conversation, and the like, usually present the question. Whether the plaintiff's character be collaterally or mainly in issue, the rule is the same. It has been held that where no express disclaimer is made by defendant as to any intention to impeach plaintiff's character, but the attitude of the defendant at the trial, and the general nature of his case on the pleadings and trial, show that he questions plaintiff's character, there plaintiff may introduce evidence in support of it.[52]

[50] Pratt v. Andrews, 4 N. Y. 493; Young v. Johnson, 123 N. Y. 226, 25 N. E. 363; Chubb v. Gsell, 34 Pa. 114. In Matthews v. Huntley, 9 N. H. 146, it is held that evidence of good character could not be introduced after defendant had given evidence to prove the truth of the charge, as the latter was not strictly impeaching evidence. Stow v. Converse, 3 Conn. 325, 345, 8 Am. Dec. 189, and Houghtaling v. Kilderhouse, 1 N. Y. 530, are to the same effect.

[51] McCowen v. Gulf, etc., Ry. Co. (Tex. Civ. App.) 73 S. W. 46.

[52] Stafford v. Association, 142 N. Y. 596, 37 N. E. 625. In Adams v. Lawson, 17 Grat. (Va.) 250, 94 Am. Dec. 455, the question was squarely decided in favor of the admission of evidence of good character in the first instance; also in Shroyer v. Miller, 3 W. Va. 158.

CHAPTER X.

OPINION EVIDENCE.

129–130. Matter of Opinion Distinguished from Matter of Fact.
131. General Rule as to Opinion Evidence.
132. Apparent Exceptions to General Rule.
133. Distinguished from Expert Evidence.
134. Opinion Evidence Proper—Reason for Admission.
135–136. Expert Opinion Evidence.
137–138. Distinction Between "Expert Testimony as to Facts" and "Expert Opinion."
139. Matters Forming Subject of Expert Opinion.
140. Hypothetical Questions.
141. Damages as the Subject of Opinion Evidence.
142–143. Sanity as the Subject of Expert Opinion.
144–145. Handwriting as the Subject of Expert Testimony.

MATTER OF OPINION DISTINGUISHED FROM MATTER OF FACT.

129. An inference as to the existence or nonexistence of a fact in issue, based upon other facts presented directly to the senses of the witness, is, in a legal sense, "opinion."

130. The statement of such inference by the witness is "opinion evidence."

Generally speaking, it may be said that opinion is the exclusive province of the jury, and that witnesses will not be allowed to invade such province. A witness is to testify to facts, so that the jury may form an opinion as to such facts and render their verdict accordingly.[1] In a practical way, and having

[1] Foster v. Murphy & Co., 135 Fed. 47, 67 C. C. A. 521, where the question was as to whether a new contract had been made. The court held that, all the facts respecting what the parties had done and said having been testified to, the witness would not be permitted to state directly whether or not a new contract was made. In a negligence action defendant cannot be asked whether he "willfully, negligently, or carelessly failed to watch and look after the fire." Sampson v. Hughes, 147 Cal. 62, 81 Pac. 292. See, also, Johnson v. Town of Highland, 124 Wis. 597, 102 N. W. 1085; Valentini v.

regard to the ordinary meaning of words, there is a clear distinction between matter of opinion and matter of fact. If we look at the matter psychologically, however, and with a nice regard for the processes of the mind, every statement resolves itself into a matter of opinion. The conclusions of the mind are all drawn from that which the senses perceive, the only difference being in the degree of removal from the immediate impression on the senses. Every statement is therefore really a statement of an inference, and in this sense all evidence is opinion evidence.[2]

Take the case where the question was as to why the plaintiff did not get into a street car and thus avoid the danger of riding upon the running board. He was asked for the reason, and answered "that it was so crowded it was impossible for him to get there before he was hurt." In one sense this may be said to be a statement of opinion—that is, the conclusion of

Insurance Co., 106 App. Div. 487, 94 N. Y. Supp. 758; Miller v. Town of Canton, 112 Mo. App. 322, 87 S. W. 96.

[2] Chamberlayne's Best on Evidence (8th Ed.) p. 473: "Accurately to distinguish 'matter of fact' from 'matter of opinion' is not less difficult than to distinguish it from 'matter of law.' In all supposed statements of fact, the witness really testifies to the opinion formed by the judgment upon the presentment of the senses. Statement of opinion is therefore necessarily involved in statement of fact."

There are many cases which arise where the question raised as to some particular statement of the witness is a question of words rather than subject. One may state a fact in several ways, and sometimes the use of one word will import an opinion, where the use of another will accord more strictly with the language of fact. In one case the witness testified that the defendant "acknowledged that he took the horses at a valuation of $50 per head." Under objection on the ground that the statement was an opinion, it was held that it was not. Probably the question would not even have been raised, had the witness used, instead of the word "acknowledged," the word "said." Hunter v. Davis, 128 Iowa, 216, 103 N. W. 373.

In another case somewhat similar, but perhaps a little stronger on the opinion side, the court held that a witness could not testify as to who "induced him to make the purchase." Jenkins v. Beachy, 71 Kan. 857, 80 Pac. 947.

A witness may not be asked whether there was any room in a car for other men, but may state whether there was any vacant or unoccupied space in the car, according to Chicago Terminal Transp. R. Co. v. O'Donnell, 114 Ill. App. 345.

the witness' mind upon a state of facts presented to his senses—and in the case in question there was sufficient doubt as to the nature of the statement to cause the objection to be raised, yet the court held, and quite properly, that legally speaking the statement was a statement of fact, and not opinion.[3]

This is a good illustration of that class of cases in which argument can always be made on either side of the question.

This is not, however, the sense in which the word "opinion" is used in the law of evidence. Legally speaking, there is matter of fact and there is matter of opinion. It is true that the line between the two is sometimes difficult to draw, but in the majority of cases the matter in question clearly falls within one class or the other.

The general rule in respect to opinion evidence may be stated as follows:

GENERAL RULE AS TO OPINION EVIDENCE.

131. Upon the question of the existence or nonexistence of any fact in issue, whether a main fact or evidentiary fact, the opinion of a witness as to its existence or nonexistence is inadmissible.[4]

[3] Indianapolis St. Ry. Co. v. Haverstick, 35 Ind. App. 281, 74 N. E. 34, 111 Am. St. Rep. 163.

[4] A clear statement of the rule, and a discussion of it, will be found in the opinion of Mr. Justice Harlan in Connecticut Mut. Life Ins. Co. v. Lathrop, 111 U. S. 612, 618, 4 Sup. Ct. 533, 28 L. Ed. 536. See, also, Simmons v. Steamboat Co., 97 Mass. 361, 371, 93 Am. Dec. 99; People v. Sharp, 107 N. Y. 427, 462, 14 N. E. 319, 1 Am. St. Rep. 851; Cook v. Fuson, 66 Ind. 521; Pennsylvania Co. v. Conlan, 101 Ill. 93; Alabama G. S. Ry. Co. v. Tapia, 94 Ala. 226, 230, 10 South. 236; Weeks v. Town of Lyndon, 54 Vt. 638; City of Parsons v. Lindsay, 26 Kan. 426, 432; Strong v. City of Stevens Point, 62 Wis. 255, 22 N. W. 425; Houston & T. C. R. Co. v. Smith, 52 Tex. 179, 186; Spencer v. Railway Co., 120 Mo. 154, 23 S. W. 126, 22 L. R. A. 668; Street R. Co. v. Nolthenius, 40 Ohio St. 376; State v. Starnes, 94 N. C. 973, 976. In Teerpenning v. Insurance Co., 43 N. Y. 279, the plaintiff sued upon a policy for the value of goods destroyed by fire. A witness who was not shown to have any knowledge as to the character, quantity, quality, or value of the goods, but who had testified that he was in the store frequently, was allowed to answer the question, "What amount of goods were there in the store at the time of the fire, according to your estimate?" In granting a new trial on

Whatever is presented to the senses of a witness, and of which he therefore receives direct knowledge, he may state, provided it is relevant to the issue, and not excluded on some other ground. This is strictly matter of fact. What he has seen or heard or felt, he knows, in the sense in which the law requires knowledge on the part of a witness testifying. What he thinks in respect to the existence or nonexistence of a fact in issue is matter of opinion, and he cannot state it. It is for him to put before the jury the facts as he has perceived them by his senses, and for the jury to form an opinion concerning the facts in proof of which the evidence is offered.[5]

There are certain exceptions to the rule which excludes opinion evidence, and there are also many other matters which have been treated as exceptions to the rule,[6] but which it is better to regard as coming within a broad definition of matters of fact.

the ground of error in the admission of this testimony, the court say (page 281): "As a rule, witnesses must state facts, and not draw conclusions or give opinions. It is the duty of the jury or court to draw conclusions from the evidence, and form opinions upon the facts proved. The cases in which opinions of witnesses are allowable constitute exceptions to the general rule, and the exceptions are not to be extended or enlarged so as to include new cases, except as a necessity to prevent a failure of justice, and when better evidence cannot be had." Compare Ryall v. Allen, 143 Ala. 222, 38 South. 851, where the question, "What amount of stock was destroyed by defendant's stock?" was held to call for facts, and not opinion.

[5] In Ogden v. People, 134 Ill. 599, 25 N. E. 755, X. was tried for robbery, and several witnesses testified that on the night of the robbery they recognized him by his voice, though they did not see him. The testimony was objected to as opinion. The court treats the question as follows (page 601, 134 Ill., and page 756, 25 N. E.): "The statement by the witnesses for the prosecution of a fact which they ascertained through the sense of hearing was not the statement of mere matter of opinion, but the statement of a conclusion reached directly and primarily from an operation of the sense of hearing. A witness can learn and know facts by and through the exercise of his perceptive faculties—his five senses—and such facts he may state." In Com. v. Scott, 123 Mass. 222, 225, 25 Am. Rep. 81, a witness was allowed to give similar testimony, identifying the accused by his voice, though witness said he could not answer as to whether there was any peculiarity about the voice, and it was held not permissi-

[6] Chase's note to Steph. Dig. Ev. art. 48.

APPARENT EXCEPTIONS TO GENERAL RULE.

132. The instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time, are, legally speaking, matters of fact, and are admissible in evidence.

The matters referred to are those of which the mind acquires knowledge by the simultaneous action of several of the senses, so that an impression is produced on the mind which cannot be traced to any one fact perceived by a single sense, but a statement of which is nevertheless a statement of a matter of fact.[7] A witness may say that a man appeared intoxicated or angry or pleased. In one sense the statement is a conclusion or opinion of the witness, but in a legal sense, and within the meaning of the phrase "matter of fact," as used in the law of evidence, it is not opinion, but is one of the class of things above mentioned, which are better regarded as matters of fact. The appearance of a man, his actions, his expression, his conversation—a series of things—go to make up the mental picture in the mind of the witness which leads to a knowledge which is as certain, and as much a matter of fact, as if he testified, from evidence presented to his eyes, to the color of a person's hair, or any other physical fact of like nature.[8]

ble for the accused to give an illustration of his voice to the jury for the purpose of further inquiry of witness in regard to his means of recognizing it.

[7] Com. v. Thompson, 159 Mass. 56, 33 N. E. 1111, where witness was permitted to testify that she noticed certain changes in her daughter, and that they indicated to her that her daughter was in a family way. Schlencker v. State, 9 Neb. 241, 1 N. W. 857, where witnesses testified that the defendant, who was accused of murder, on the day of the murder "acted funnier than he ever did before," "looked kind of fierce," "looked as if he was dreaming—as if there was something on his mind." Powers v. State, 23 Tex. App. 42, 63, 5 S. W. 153.

[8] In Connecticut Mut. Life Ins. Co. v. Lathrop, 111 U. S. 612, 4 Sup. Ct. 533, 28 L. Ed. 536, the plaintiff sued on an insurance policy upon the life of her husband. The defense was that the husband committed suicide. The plaintiff, to meet the defense of suicide,

This class of evidence is treated in many of the cases as opinion admitted under exception to the general rule,[9] and in others as matter of fact—"shorthand statement of fact," as it is called. It seems more accurate to treat it as fact, as it embraces only those impressions which are practically instantaneous, and require no conscious act of judgment in their formation. The

sought to show that her husband was insane, and called a servant in the family, and other witnesses acquainted with him. These witnesses were permitted to testify that the deceased "looked like he was insane," in connection with describing his appearance and actions. In reference to this kind of testimony, Justice Harlan says (page 620, 111 U. S., and page 537, 4 Sup. Ct. [28 L. Ed. 536]): "The truth is, the statement of a nonprofessional witness as to the sanity or insanity at a particular time of an individual whose appearance, manner, habits, and conduct came under his personal observation is not the expression of mere opinion. In fine, it is opinion, because it expresses an inference or conclusion based upon observation of the appearance, manner, and motions of another person, of which a correct idea cannot well be communicated in words to others, without embodying, more or less, the impressions or judgment of the witness. But in a substantial sense, and for every purpose essential to a safe conclusion, the mental condition of an individual, as sane or insane, is a fact, and the expressed opinion of one who has had adequate opportunities to observe his conduct and appearance is but the statement of a fact." And in Dunham's Appeal, 27 Conn. 192 (page 190), it is said in reference to this class of evidence: "The judgment of a witness, founded on actual observation of the capacity, disposition, temper, character, peculiarities of habit, form, features or handwriting, of others, is different from, and more than, a mere opinion of an expert. It approaches to knowledge, and in fact is knowledge, so far as the imperfection of human nature will permit knowledge of these things to be acquired, and such knowledge is

[9] In De Witt v. Barly, 17 N. Y. 340, 353, the evidence is treated as opinion. The question was, "Did you discover any change in Mr. De Witt before you moved off the premises?" and the answer: "I did. It appears the old man was getting a little childish. I thought so. * * * The old man was a little light-headed, some way, I took it, in the way of business." This is plainly the ordinary case of the witness giving his impression caused by the appearance or actions, or both, of the person referred to. The court say in reference to it: "It is obvious that this entire answer consisted solely of the expression of the opinion of the witness, bearing in the most direct manner upon the very point to be determined." The court held it admissible as an exception to the rule. See, also, McKillop v. Railway Co., 53 Minn. 532, 55 N. W. 739; McCabe v. San Antonio Traction Co. (Tex. Civ. App.) 88 S. W. 387.

evidence is almost universally admitted, and very properly, as it is helpful to the jury, in aiding to a clearer comprehension of the facts.

SAME—DISTINGUISHED FROM EXPERT EVIDENCE.

133. Evidence of this sort is not expert evidence, and should not be confused with it. It may be given by any person who is competent as a witness, and under whose observation the facts have come.

proper evidence for the jury." Com. v. Sturtivant, 117 Mass. 122, 19 Am. Rep. 401; Village of Shelby v. Clagett, 46 Ohio St. 549, 22 N. E. 407, 5 L. R. A. 606; Kansas Pac. Ry. Co. v. Whipple, 39 Kan. 531, 537, 18 Pac. 730. The following are some of the matters which, viewed in their true light, as matters of fact ("shorthand interpretations of fact," as it has sometimes been expressed), or upon the erroneous theory that they were matters of opinion, and exceptions to the general rule, have been admitted: That a person looked or acted in an irrational manner, Paine v. Aldrich, 133 N. Y. 544, 30 N. E. 725; Charter Oak Life Ins. Co. v. Rodel, 95 U. S. 232, 24 L. Ed. 433; People v. Lavelle, 71 Cal. 351, 12 Pac. 226; or looked "fierce," Schlencker v. State, 9 Neb. 248, 1 N. W. 857; or "scared," State v. Ramsey, 82 Mo. 133, 137; or "seemed unfriendly," Blake v. People, 73 N. Y. 586; or "spoke affectionately," Appeal of Spencer, 77 Conn. 638, 60 Atl. 289; Polk v. State, 62 Ala. 237; State v. James, 31 S. C. 218, 233, 9 S. E. 844; that a person appeared "sober" or "intoxicated," People v. Eastwood, 14 N. Y. 562; Castner v. Sliker, 33 N. J. Law, 95; City of Aurora v. Hillman, 90 Ill. 61; Cook v. Insurance Co., 84 Mich. 12, 47 N. W. 568; that a young woman "seemed sincerely attached to a young man," McKee v. Nelson, 4 Cow. (N. Y.) 355, 15 Am. Dec. 384; that a horse "appeared tired," State v. Ward, 61 Vt. 153, 181, 17 Atl. 483; that snow "looked as if some one had fallen there and left the impress of his body," Rothrock v. City of Cedar Rapids, 128 Iowa, 252, 103 N. W. 475. So, also, a nurse has been permitted to testify to a "numbness" in her patient, Will v. Village of Mendon, 108 Mich. 251, 66 N. W. 58. Testimony as to a person's state of health—whether he had "failed," or appeared in "good" or "bad health"—is admissible on the same principle, Com. v. Brayman, 136 Mass. 438; South & North Ala. R. Co. v. McLendon, 63 Ala. 266; Smalley v. City of Appleton, 70 Wis. 340, 35 N. W. 729; as to "mental anguish" suffered by reason of failure to deliver a telegram, Sherrill v. Telegraph Co., 117 N. C. 352, 23 S. E. 277. Testimony that a spot was "blood" is held to be within the same rule in Greenfield v. People, 85 N. Y. 75, 83, 39 Am. Rep. 636. But it has been held that a witness may not give his opinion that plaintiff was feigning. McCormick v. Railway Co., 141 Mich. 17, 104 N. W. 390.

Evidence of this sort is sometimes confused with expert evidence. It is in no sense expert evidence, and, if a witness put on the stand as an expert testifies to such facts, he leaves his character as an expert, and testifies only to what any ordinary witness, who has had the opportunity to acquire the knowledge, can testify to. It is a method of placing before the jury, in a general and broad way, a group of facts which, in detail, would be difficult of description, but which, as a whole, make up a certain conception, grasped at once by the mind.[10]

The admissibility of such evidence does not extend to cases where it would not prove helpful to the jury, nor where its application would carry the witness into an expression of real opinion upon matters which it is the jury's province to decide.[11] In some of the cases which are just on the line between opinion and fact, it has been held, in certain instances where

[10] In Com. v. Sturtivant, 117 Mass. 122, 19 Am. Rep. 401, a witness was allowed to state that a pair of shoes looked as if they had been washed. In reference to this testimony the court says (page 138 of 117 Mass. [19 Am. Rep. 401]): "The witness stated the result of his observation made at the time, of appearances that could not be reproduced or accurately described in words to the jury; and his testimony related to a subject-matter within the common observation and experience of men." To the same effect are Town of Cavendish v. Town of Troy, 41 Vt. 99, 108; State v. Buchler, 103 Mo. 203, 207, 15 S. W. 331; Rothrock v. City of Cedar Rapids, 128 Iowa, 252, 103 N. W. 475.

[11] In Ferguson v. Hubbell, 97 N. Y. 507, 49 Am. Rep. 544, A. sued X. for damages caused by fire alleged to have been negligently built by X. on his land, from which it was communicated to A.'s land. A.'s contention was that in consequence of the wind, and dryness of the ground and brush, it was an improper time to build fires to clear the land. The court allowed a witness to answer the question, "What do you say as to whether it was a proper time, or not, to burn a fallow?" This was held erroneous, upon the ground that it asked for an opinion upon a controlling issue, which was to be determined by the jury. See Dooner v. Canal Co., 164 Pa. 17, 33, 30 Atl. 269, 271, where it is said: "The jury still have some duties to perform. Inferences drawn from the ordinary affairs of life ought not to be drawn for them, and turned over under oath from the witness stand." See, also, City of Parsons v. Lindsay, 26 Kan. 426; Wight Fireproofing Co. v. Poezekai, 130 Ill. 139, 22 N. E. 543; Stowe v. Bishop, 58 Vt. 498, 3 Atl. 494, 56 Am. Rep. 569; Gutridge v. Railway Co., 94 Mo. 468, 472, 7 S. W. 476, 4 Am. St. Rep. 392; Courser v. Kirkbride, 23 N. B. 404; Coe v. Van Why, 33 Colo. 315, 80 Pac. 894; Dolon v.

it appears that it will really aid the jury, that an ordinary observer, in connection with a statement of the facts, may give his opinion based upon them.[12] Some of the cases go to an extent which hardly seems warranted by the principle upon which this class of quasi opinion evidence is admitted, and allow what seems to be strictly opinion evidence.[13]

OPINION EVIDENCE PROPER—REASON FOR ADMISSION.

134. Opinion evidence seems to have been originally admitted as an aid to the court, but finally came to be admitted solely on the ground of assistance to the jury.

The original character of the jury was that of witnesses to the facts, which they were called upon to decide from their own knowledge. They were expected to draw their conclusions and give their opinion as to the facts in issue. As has been seen, the development of the jury system eliminated from it that feature which required the jurymen to be persons who had original knowledge of the facts, and, in the final outcome, withdrew from their consideration any facts of which they had

Herring-Hall-Marvin Co., 105 App. Div. 366, 94 N. Y. Supp. 241; City of Lawrence v. Town of Methuen, 187 Mass. 592, 73 N. E. 860.

[12] In Armstrong v. Railway Co., 45 Minn. 85, 47 N. W. 459, the action was for damages to A.'s horse while in the possession of the defendant for purposes of transportation; the claim being that defendant put the horse in an unsafe stable, where the horse was exposed to cold and wind. The defendant offered the testimony of a farmer acquainted with the country and the stable in question, and proposed to ask him, as an expert, whether he considered the stable a safe and suitable one. It was held that the testimony was admissible. This case goes a long way beyond the usual limitation of opinion evidence, and is scarcely to be defended on principle. See, also, International & G. N. Ry. Co. v. Klaus, 64 Tex. 293.

[13] Ryan v. Town of Bristol, 63 Conn. 26, 37, 27 Atl. 309, where the question being as to the dangerous character of the highway, in an action for negligence, a witness was permitted to answer the question, "With that rail down, and that place in the condition you have described, I ask you whether or not the place was bad and dangerous?" See, also, Sydleman v. Beckwith, 43 Conn. 9; Jones v. Fuller, 19 S. C. 66, 45 Am. Rep. 761, where, in an action for breach of promise of marriage, witnesses were asked, "From what you know of all the facts and circumstances, how much was the plaintiff damaged?"

original knowledge, confining them to such facts only as should be presented to them at the trial. This left to the jury simply the duty of drawing conclusions from facts presented. In many cases it was impossible to present to the minds of the jury, who were supposed to have no previous knowledge, the facts in such detail as to furnish grounds for intelligent opinion. Sometimes this was due to the facts being so numerous, uncertain, or incapable of description, as to be difficult to present. At other times it happened that the matters about which it was necessary for the jury to form an opinion were of such a technical or scientific nature that, even were the facts presented to the jury, they would be incapable of forming an intelligent opinion. These considerations led to the admitting of opinion evidence.[14]

It has been said that opinion evidence was originally admitted for the purpose of helping the court—helping it in a way which would render it possible for the court to give the jury proper instructions with regard to the facts.[15] The final development of the practice as to the admission of opinion evidence was that in the class of cases mentioned it was allowed as an aid to the jury in making up their minds upon matters about which, without it, they might with difficulty come to an intelligent understanding.[16] The principle is clear enough, but in its application it often leads to what seem to be inconsistent results. All that can be said is that in each case the court must decide the question on a careful consideration of the particular circumstances under which it arises, and if, in the judg-

[14] Folher v. Chadd (1782) 3 Doug. 157, was a case in which an engineer was called to show the effect of an embankment upon the filling up of a harbor. Lord Mansfield says: "Mr. Smeaton [the witness] understands the construction of harbors, the cause of their destruction, and how remedied. In matters of science, no other witnesses can be called." Thornton v. Assurance Co. (1790) Peake, 37; Beckwith v. Sydebotham (1807) 1 Camp. 116.

[15] Thayer, Cas. Ev. (2d Ed.) p. 672, note. Prof. Thayer cites several cases which seem to bear out the opinion expressed in his note, that experts came into court originally as helpers of the court, to wit: Lib. Ass. (1353) p. 145, pl. 5; Y. B. (1493) 9 Hen. VII, p. 16, pl. 8; Alsop v. Bowtrell, Cro. Jac. (1619) 541.

[16] Van Wycklen v. City of Brooklyn, 118 N. Y. 424, 429, 24 N. E. 179.

ment of the court, the jury would be materially helped by the admission of the evidence, it is to be received. This does not mean that the jury are to receive opinion evidence merely because a witness can be produced who is better educated, has a wider range of knowledge and more acute reasoning powers, and who might therefore express opinions with more accuracy than the jurymen themselves.[17] It is the nature of the subject-matter under examination, rather than the particular facts put before the jury, which must be looked to. The particular facts may be clear and undisputed, and yet the jury be utterly unable to draw any intelligent conclusion from them without the aid of outside opinion. Issues in respect to disease, its causes and effects, which frequently arise in the cases, present instances of this sort. A skilled physician, qualified by education and experience, can arrive at an opinion where men in the ordinary walks of life would be utterly at a loss. Opinion in such a case is, by the nature of the subject, made not only proper, but necessary. In such a case there is no difficulty. It is in those cases which are nearer the line of practical every-day matters that the difficulties arise. When a witness, for example, is put before the jury to give his opinion as to whether a certain time of year was a proper time to set fire to fallow lands,[18] whether a stable is an unsafe stable for horses,[19]

[17] New England Glass Co. v. Lovell, 7 Cush. (Mass.) 319, Shaw, C. J., uses the following language in explanation of the principle upon which opinion evidence is admissible (page 321): "Now, when this experience is of such a nature that it may be presumed to be within the common experience of all men of common education, moving in the ordinary walks of life, there is no room for the evidence of opinion; it is for the jury to draw the inference. It is not because a man has a reputation for superior sagacity and judgment and power of reasoning that his opinion is admissible. If so, such men might be called in all cases to advise the jury, and it would change the mode of trial. But it is because a man's professional pursuits, his peculiar skill and knowledge in some department of science not common to men in general, enable him to draw an inference where men of common experience, after all the facts proved, would be left in doubt." National Gas Light & Fuel Co. v. Miethke, 35 Ill. App. 629; Horst v. Lewis, 71 Neb. 365, 103 N. W. 460.

[18] Ante, p. 223, note 10. In Ferguson v. Hubbell, 97 N. Y. 507, 513, 49 Am. Rep. 544, the rule in regard to the admission of expert tes-

[19] Armstrong v. Railway Co., 45 Minn. 85, 47 N. W. 459.

whether a fight is a "prize fight,"[20] or whether the keeping of cows in connection with a hotel is unprofitable,[21] the court is presented with the question whether, because some men know more about the matters than others, and more, it may appear, than the jury is likely to know, even after all the testimony is in, and their opinions may be submitted to aid the jury in arriving at a conclusion. All that need be said is that it rests in the sound discretion of the court as to whether the subject is one which permits of opinion testimony being given. The current of the decisions shows that the prerogative of the jury to form their own opinions is well guarded.[22]

timony is well stated by Judge Earl: "It is not sufficient to warrant the introduction of expert testimony that the witness may know more of the subject of inquiry, and may better comprehend and appreciate it, than the jury; but, to warrant its introduction, the subject of the inquiry must be one relating to some trade, profession, science, or art in which persons instructed therein by study or experience may be supposed to have more skill and knowledge than jurors of average intelligence may be presumed generally to have. The jurors may have less skill and experience than the witnesses, and yet have enough to draw their own conclusions, and do justice between the parties. When the facts can be placed before a jury, and they are of such a nature that jurors generally are just as competent to form opinions in reference to them, and draw inferences from them, as witnesses, then there is no occasion to resort to expert or opinion evidence."

[20] Seville v. State, 49 Ohio St. 117, 30 N. E. 621, 15 L. R. A. 516.

[21] Smith v. Stevens, 33 Colo. 427, 81 Pac. 35. It was held here that the subject was of such general knowledge that the jury should be left to form their own opinion.

[22] National Biscuit Co. v. Nolan, 138 Fed. 6, 70 C. C. A. 436. Opinion evidence has been held inadmissible as to whether certain signals given by a railroad company are reasonable or unreasonable, Hill v. Railroad Co., 55 Me. 438, 444, 92 Am. Dec. 601. See, also, along the same line, Oakes v. Weston, 45 Vt. 430; Seliger v. Bastian, 66 Wis. 521, 29 N. W. 244; Muldowney v. Railway Co., 36 Iowa, 462, 472; as to vacancy to a house increasing danger of loss by fire, Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 469, 24 L. Ed. 256; Luce v. Insurance Co., 105 Mass. 297, 7 Am. Rep. 522; Kirby v. Insurance Co., 9 Lea (Tenn.) 142; contra, Cornish v. Insurance Co., 74 N. Y. 295; as to whether two labels are so similar as to be calculated to deceive an ordinarily careful person, Radam v. Microbe Destroyer Co., 81 Tex. 122, 129, 16 S. W. 990, 26 Am. St. Rep. 783; as to whether a certain fast-mail train was a "passenger train," Illinois Cent. R. Co. v. People, 143 Ill. 434, 449, 33 N. E. 173, 19 L. R. A. 119; as

EXPERT OPINION EVIDENCE.

135. The class of opinion evidence which forms a real exception to the excluding rule is that which is generally denominated as "expert evidence."

136. The rules with respect to the use of expert evidence, and the manner of its introduction, are numerous. They follow, in the main, the principle of furnishing assistance to the jury upon the subject to which the evidence relates.

When a witness is offered as an expert, the court is confronted with two preliminary questions: First, whether the subject is one upon which expect testimony is admissible; second, whether the person offered as a witness is an expert. As heretofore explained, there is a well-recognized principle upon which the first question is decided,—that of furnishing aid to the jury in matters difficult for an ordinarily intelligent person to understand. The question is one for the court's determination upon all the facts as they appear.

If it be determined that the subject is a proper one for the introduction of expert testimony, the next question is whether or not the witness offered is an expert. If he is not, his opinion cannot go before the jury. Preliminary evidence must therefore be offered to show that the witness is an expert. This evidence is, however, confined to testimony of the witness himself, as to his special qualifications, and it is for the determination of the court, and not the jury, whether he is sufficiently qualified.[23]

to whether a proposed change in a highway was of public utility, Johnson v. Anderson, 143 Ind. 493, 42 N. E. 815; as to whether a party whose temperament witness has testified to would do an act attributed to him, Smith v. Smith, 117 N. C. 326, 23 S. E. 270. Opinion evidence has sometimes been excluded on the ground that the subject was beyond the powers of any person, expert or nonexpert, to express an opinion upon, and in such case the jury must be left

[23] Montana Ry. Co. v. Warren, 137 U. S. 348, 353, 11 Sup. Ct. 96, 34 L. Ed. 681; Slocovich v. Insurance Co., 108 N. Y. 56, 14 N. E. 802; Teele v. City of Boston, 165 Mass. 89, 42 N. E. 506; Delaware & Chesapeake Steam Towboat Co. v. Starrs, 69 Pa. 36; City of Ft. Wayne v. Coombs, 107 Ind. 75, 85, 7 N. E. 743, 57 Am. Rep. 82.

This question of qualification cannot be properly postponed for determination by the cross-examination, but must be decided at once and prior to the witness being allowed to testify.[24] If he is sufficiently qualified, then he may give his knowledge and opinion for the benefit of the jury. There is no strict rule which may be laid down as to what is sufficient qualification for an expert witness. The only thing which can be said is that the principle of helpfulness to the jury is to be kept in mind as the guiding principle. It is of no use to put before the jury opinion which is not founded on special qualification, —qualification which is not possessed by the jury, which gives to its possessor an authority to speak, and commands for him a respectful hearing among ordinary business men.[25] The qualification is that which is recognized in the ordinary affairs of life as sufficient to give weight to an opinion, upon which men are justified in relying and acting, and upon which they do rely and act. The courts are governed by the same principles which obtain throughout the fabric of business and social life, and what is of importance in the one place has the same

to reach a result from the facts testified to, in the best manner possible. Such was the case of Trapp v. Druecker, 79 Wis. 638, 48 N. W. 664, where, upon the question of what the plaintiff was entitled to for his services in discovering and perfecting a patent, the court excluded a question put to a machinist as to whether a person could profitably spend 1,700 hours in the work.

[24] Dolan v. Herring-Hall-Marvin Safe Co., 105 App. Div. 366, 94 N. Y. Supp. 241.

[25] Where a defendant was charged with having unlawfully cut timber belonging to the United States, and sought to prove that the land where the timber was cut was mineral land, a witness who was not shown to have any knowledge of the locality from which the timber was cut cannot give his opinion that the ground along the bed of the creek nearest to the place where the timber was cut contained gold in quantities it would pay to abstract, even though such witness was a miner of long experience. Special qualification is necessary to render an opinion admissible. Lynch v. United States, 138 Fed. 535, 71 C. C. A. 59.

Where the defendant, an osteopath, was being sued for negligent treatment of the plaintiff, it was held that an expert medical witness, but not himself an osteopath, and not familiar with the treatment prescribed by osteopathy, could not give his opinion as to such treatment, not being sufficiently qualified. Grainger v. Still, 187 Mo. 197, 85 S. W. 1114, 70 L. R. A. 49.

importance in the other. If a man wishes to buy real estate, he is apt to get his idea of value, upon which he will act in making his purchase, from those who make it a business to deal in real estate. If he wishes to buy stocks and bonds, or a commercial commodity, a very important element in fixing in his mind what the value of such property may be is the market rate, which he finds in his newspaper, or learns from his broker. Where the ordinary business man goes for help upon these questions, there may also the jury go, and he who is qualified to give an opinion in the one case may also give an opinion in the other.[26]

DISTINCTION BETWEEN "EXPERT TESTIMONY AS TO FACTS" AND "EXPERT OPINION."

137. "Expert testimony as to facts" is nothing more than ordinary testimony as to facts given by witnesses specially qualified by observation and experience to give it.

138. "Expert opinion" is real opinion evidence, which has its value in some special qualification of the witness to form an opinion, which the jury does not possess.

[26] Clark v. Baird, 9 N. Y. 183; Swan v. Middlesex County, 101 Mass. 173, 177; Cliquot's Champagne, 3 Wall. (U. S.) 114, 141, 18 L. Ed. 116; Sisson v. Railroad Co., 14 Mich. 489, 497, 90 Am. Dec. 252; Hoxsie v. Lumber Co., 41 Minn. 548, 551, 43 N. W. 476. In Whitney v. Thacher, 117 Mass. 523, A. sued X. for breach of contract, for failure to receive 250 bales of gunny bags purchased by X. and delivered at New York. On the question of damages, A. called two brokers who were members of firms having houses both in Boston and New York, and who testified that they were familiar with the market price of gunny bags in New York, from daily price current lists and returns of sales daily furnished them in Boston from their New York houses. Upon objection to their competency, the court permitted them to testify to the value of the bags. Wells, J., says (page 527): "It is not necessary, in order to qualify one to give an opinion as to values, that his information should be of such a direct character as would make it competent in itself as primary evidence. It is the experience which he acquires in the ordinary conduct of affairs, and from means of information such as are usually relied on by men engaged in business, for the conduct of that business, which qualifies him to testify."

For an interesting article on the use and abuse of expert testimony, see 11 Harvard Law Rev. 169.

There are two classes of witnesses who are ordinarily spoken of as experts. The one embraces those persons who, by reason of special opportunities for observation, are in a position to judge of the nature and effect of certain matters better than persons who have not had opportunity for like observation. For example, one who has had opportunity to observe the running of trains may testify as to the speed of an ordinary train.[27] Such witnesses are really not experts, in the strict sense of the term; they are only specially qualified witnesses. Any person, having been placed in the same position, and having had the same opportunities for observation, could give like testimony.[28]

The other class embraces those witnesses who, by reason of a special course of training or education, are qualified to give an opinion, on certain matters, of a peculiar value,—of a value much greater than the opinion of a person not specially versed in the subject.[29] Any one may have an opinion in respect to the same matters, but the opinion would be of no value to the jury, or at least of no more value than the opinion which may be formed by the jurymen themselves. If it comes, however, from a specially trained witness—one who has been accustomed to judge of the matters under consideration, and has qualified himself to do so—it has a value which justifies the jury in fol-

[27] Atchison, T. & S. F. Ry. Co. v. Holloway, 71 Kan. 1, 80 Pac. 31. Or as to how far a common headlight will light up the track. St. Louis, M. & S. E. Ry. Co. v. Shannon, 76 Ark. 166, 88 S. W. 851. A person familiar with the sawmill business and with a particular mill may testify as to the capacity of such mill. Fletcher v. Prestwood, 143 Ala. 174, 38 South. 847.

[28] Upon the question of the damages occasioned by a railroad running through land, it is held that one acquainted with the land, knowing its capabilities and the proper mode of cultivating it, may give an opinion as to the increased expense in cultivating it occasioned by the location of the railroad through it. Tucker v. Railroad, 118 Mass. 546. On the contrary, brakemen and conductors have been held not to be so qualified as to render their opinions valuable to a jury upon the question of the coupling of cars. Muldowney v. Railway Co., 36 Iowa, 462. In Cain v. Uhlman, 20 Nova Scot. 148, 153, the distinction mentioned in the text is recognized and acted on in the admission of certain testimony as to the comparative levels of the water in two milldams, which was held to be testimony as to facts merely.

[29] Grigsby v. Water Co., 40 Cal. 396, 405.

lowing it, even though it be at variance with their own opinions.[30]

The two classes of expert testimony above mentioned have been distinguished by being called, respectively, expert testimony as to facts, and expert opinion. Expert testimony as to facts really is no exception to the rule which excludes opinion evidence. It is convenient, however, to treat this class of testimony in connection with expert opinion.

Some Examples of Expert Testimony as to Facts.

Among the subjects upon which expert testimony of this class has been held proper is that of the foreign law—using the word "foreign" in a sense relative to the jurisdiction in which the question arises. The unwritten foreign law may be proved by so-called experts in such law; that is, by lawyers or judges practicing under or administering it.[31] Yet what is given in evidence when proof of this kind is offered is facts, and not

[30] In U. S. v. McGlue, 1 Curt. (U. S.) 1, Fed. Cas. No. 15,679, the charge to the jury in respect to the regard to be paid to opinions of physicians as to whether the accused was affected with delirium tremens was as follows: "And here I may remark, gentlemen, that although in general witnesses are held to state only facts, and are not allowed to give their opinions in a court of law, yet this rule does not exclude the opinions of those whose professions and studies or occupations are supposed to have rendered them peculiarly skillful concerning questions which arise in trials, and which belong to some particular calling or profession. We take the opinions of physicians in this case for the same reason we resort to them in our own cases out of court—because they are believed to be better able to form a correct opinion upon a subject within the scope of their studies and practice than men in general, and therefore better than those who compose your panel."

[31] Ennis v. Smith, 14 How. (U. S.) 400, 426, 14 L. Ed. 472; Liverpool & G. W. S. Co. v. Phenix Ins. Co., 129 U. S. 397, 445, 9 Sup. Ct. 469, 32 L. Ed. 788; Mowry v. Chase, 100 Mass. 79, 86; In re Roberts' Will, 8 Paige (N. Y.) 446; Hall v. Costello, 48 N. H. 176, 2 Am. Rep. 207; Greasons v. Davis, 9 Iowa, 219. In Mowry v. Chase, supra, A. sued X. in the state of Massachusetts, upon a judgment previously obtained by him in the state of Rhode Island. X. claimed that there was no such service on him as gave the court in Rhode Island jurisdiction over him. A. was allowed to prove by lawyers and judges of the state of Rhode Island that by the common law of that state the service was sufficient. The court say, "The evidence as to the unwritten law of the state was properly admitted, such law being provable as a fact."

opinion. This is recognized in most of the cases cited. The interpretation of statutory or written foreign law sanctioned by practice or decisions in the foreign jurisdiction constitutes a part of the unwritten law, and may be proved in the same way.[32]

It is for the court to decide what the foreign law is, basing its decision upon the evidence offered.[33] The general doctrine is that, if proved by decisions, the decisions must be those of the highest court in the jurisdiction.[34] It has been held that where the meaning of a foreign statute is to be determined, and no construction has been placed upon the statute by the courts in the state where it is enacted, the opinions of attorneys as to the meaning and testimony as to the consensus of opinion of the bench and bar of the state enacting the statute are inadmissible.[35] It has also been held that the written or statute law may be proved by experts, who may testify orally without producing an exemplified copy.[36]

The physiology of the human body, and the condition and operation of any of its functions, have been a fruitful field for this class of testimony.[37] Terms peculiar to a certain trade

[32] Dyer v. Smith, 12 Conn. 384; Bush v. Garner, 73 Ala. 162, 168.

[33] Christiansen v. Graver Tank Works, 223 Ill. 142, 79 N. E. 97; Ferguson v. Clifford, 37 N. H. 86; Hooper v. Moore, 50 N. C. 130. In the first case cited the proof was given and considered by the judge out of the presence of the jury, and it was held there was no error. It has been suggested that, where the evidence is conflicting, the whole matter should be left to the jury. Note 20 Harvard Law Rev. 575.

[34] See Secombe v. Railroad Co., 23 Wall. (U. S.) 108, 23 L. Ed. 67; Van Matre v. Sankey, 148 Ill. 536, 36 N. E. 628, 23 L. R. A. 665, 39 Am. St. Rep. 196. In one case the court actually refused to receive a decision of an inferior court as representing the foreign law. Schmaltz v. Manufacturing Co., 204 Pa. 1, 53 Atl. 522, 93 Am. St. Rep. 782. Unless the introduction of the decision of the lower court was accompanied by proof that there was no decision of the point by a higher court in such jurisdiction, the conclusion in the case cited seems proper.

[35] Clark v. Elkins, 38 Wash. 376, 80 Pac. 556, 107 Am. St. Rep. 858.

[36] Sussex Peerage Case, 11 Clark & F. 85; Barrows v. Downs, 9 R. I. 446, 11 Am. Rep. 283; Consolidated Real Estate & Fire Ins. Co. v. Cashow, 41 Md. 60, 79.

[37] Young v. Makepeace, 103 Mass. 50, where it was held that an

or business, or having a special significance, which would not be understood by the ordinary person, may be explained by witnesses familiar with them. This, also, will be seen to be but ordinary testimony as to facts by specially qualified witnesses.[88] These and many other matters requiring special knowledge for their proper understanding are the subject of expert testimony as to facts.

Expert testimony is usually thought of in connection with inquiry as to technical or abstruse scientific questions—questions requiring, as an essential to intelligent judgment, a special training of the mind—and this is the field in which the usefulness of such testimony is most often felt. But there are many matters relating to common, everyday affairs, about which witnesses are permitted to give opinions. The matters here referred to are not those in connection with which witnesses are permitted to give their "impressions." Impressions, in the sense in which they are admissible, as explained, are

ordinary physician, attending at the birth of an infant, could testify as to whether it was a "full-time" child. See, also, Stephens v. People, 4 Park. Cr. R. (N. Y.) 396.

[88] Term "loaf sugar," as used in the sugar trade. U. S. v. Breed, 1 Sumn. (U. S.) 159, 167, Fed. Cas. No. 14,638. "All faults," as used upon a sale of goods at auction. Whitney v. Boardman, 118 Mass. 242. "Raceway," as used in hydraulic engineering. Wilder v. De Cou, 26 Minn. 10, 18, 1 N. W. 48. But it has been held that whether a glove contest is a "prize fight" is not the subject of expert testimony. In the case of Seville v. State, 49 Ohio St. 117, 30 N. E. 621, 15 L. R. A. 516, S. was indicted for engaging in a prize fight. On the trial, S. called a witness who testified that he had been engaged in 52 prize fights and glove contests, and had spent six years in acquiring the art of boxing. He was then asked, "What are the rules which apply to a glove contest, and also to a prize fight?" Also, whether the combat in which S. was engaged (which witness testified he had seen) was conducted according to the rules of a glove contest, or those of a prize fight. Objections to both questions were made and sustained. On error, the Supreme Court held that the question was not one of skill or science, "but one within the comprehension of the common understanding and the range of common knowledge, which the jury could decide, upon the facts proven, as well as a professional pugilist." Whether land is mineral land has been held to be a subject upon which a jury is competent to form an opinion without the help of an expert. Lynch v. U. S., 138 Fed. 535, 71 C. C. A. 59.

nothing more than the composite expression of many facts which have been presented to the senses. What is here meant is opinion evidence pure and simple—opinion evidence with respect to matters of everyday experience, about which intelligent men may draw reasonable conclusions. Even in this field the practice of allowing opinion evidence has made some inroads. In the varied and greatly diversified interests which occupy the time and thought of men, and the division and subdivision of labor which result therefrom, we find an influence which tends to confine the ordinary man within the narrow limits of a particular line of duties, connected with a small part of some branch of business, with the inevitable result that he becomes peculiarly qualified to reason and judge as to matters in his particular line, and remains singularly ignorant of things outside of it. It may be because of this influence, or because of something else, but the tendency exists to regard every man as an expert in his own line. The courts have been affected to a certain extent by this influence, as is natural, and indeed quite proper; and if it does not wholly account for, it may serve to throw light upon, the cases where the field of opinion evidence has been so widely extended.[39]

[39] Ft. Worth & D. C. Ry. Co. v. Thompson, 75 Tex. 501, 503, 12 S. W. 742. We occasionally find in the cases a protest against the extension of this kind of testimony, as in O'Neil v. Railroad Co., 129 N. Y. 125, 29 N. E. 84, 26 Am. St. Rep. 512, where a question was put as follows: "Suppose a truck weighing nineteen hundred pounds, or thereabouts, carrying a load of thirty-six hundred pounds, or thereabouts, and drawn by a horse weighing twelve to thirteen hundred pounds, or thereabouts, and that the horse and truck were being driven up Broadway, and were at the time within one hundred feet of Walker street, driving north, with the horse on a walk, and the horse being a gentle and tractable animal, under full control at the time; within what distance could such a truck, under such circumstances, be stopped, the pavement being wet by sprinkling carts?" And Earl, J., says (page 129, 129 N. Y., and page 84, 29 N. E. [26 Am. St. Rep. 512]) in reference to it: "This belongs to a class of questions not much to be encouraged. The answer to such a question can be of little service to jurors. They are generally acquainted with such common things as trucks and horses, and the power, actions, and capacity of horses, which, particularly in the city of New York are constantly open to observation. Yet we cannot say that the expert witness did not know more about the subject of the inquiry than ordinary jurors can generally be supposed to know.

MATTERS FORMING SUBJECT OF EXPERT OPINION.

139. Expert opinion is admissible upon any subject which, in the judgment of the court, will be made clearer by its introduction.[40]

In accordance with the principles already explained, upon which expert opinion is held admissible, we find the courts admitting the testimony in a great variety of cases, and where almost every trade, profession, or art is concerned.[41] The testimony, in some of its particular aspects—those relating to values, insanity, and handwriting—is separately noticed in the

The question is barely competent, and probably was not harmful; and the judgment should not, therefore, be reversed because the judge allowed it to be answered." In Clinton v. Howard, 42 Conn. 294, a witness accustomed to drive and handle horses was allowed to state his opinion as to whether a pile of stones of certain size and character, placed in the road, was calculated to frighten a gentle horse. See, also, Armstrong v. Railway Co., 45 Minn. 85, 47 N. W. 459, referred to in note, ante, p. 224. In Baltimore & R. Turnpike Road v. State, 71 Md. 573, 584, 18 Atl. 884, it was held that "whether a four-horse wagon loaded with wood is calculated to frighten a well-broken horse" was not a subject of expert testimony, but "was a matter in regard to which each juror was quite as competent to form an opinion as the witness himself." The case of Welch v. Insurance Co., 23 W. Va. 288, presents facts where it would seem that the opinion evidence held to have been erroneously admitted by the trial court might well have been helpful. The question was as to the quantity of wool in a building destroyed by fire. The plaintiff claimed more than the insurance company was willing to allow. The insurance company offered as an expert witness one who had, as an adjuster, been familiar with fires, and their effect on different kinds of merchandise, and asked him the question, "If a frame building, 18 by 22 feet, and a story and a half high, containing 10,000 or 12,000 pounds of wool, should burn, state whether or not, in your opinion, the wool would be destroyed?"

[40] Kershaw v. Wright, 115 Mass. 361; Ferguson v. Hubbell, 97 N. Y. 513, 49 Am. Rep. 544.

[41] Rice v. Wallowa County, 46 Or. 574, 81 Pac. 358, the subject of expert testimony here was how long tamarack timbers will remain sound while in contact with the ground; whether switch frogs are dangerous when unblocked, Schroeder v. Railway Co., 128 Iowa, 365, 103 N. W. 985; as to the appliances required for the careful operation of a railroad, Pittsburgh, S. & N. Ry. Co. v. Lamphere, 137 Fed. 20, 69 C. C. A. 542.

following paragraphs. In a general way, it will be seen from the cases cited in the notes that the ranks of expert witnesses are recruited from physicians, surgeons, chemists, engineers, lawyers, real-estate men, and, indeed, almost every class of men engaged in pursuits requiring special experience or education on the part of those carrying them on.[42]

Scientific and Medical Books in Relation to Expert Testimony.

The opinion of an expert in reference to certain matters of science, especially in the line of medicine or chemistry, may be based upon an intimate knowledge of and familiarity with the standard authorities upon those subjects, as well as upon experimental facts. In this case it is proper to show that the expert has this knowledge and familiarity. But the books themselves are not admissible as expert evidence, though they are sometimes used to contradict a witness who has referred to them as a basis for an opinion.[43] In some jurisdictions,

[42] Physicians and surgeons: People v. Harris, 136 N. Y. 423, 434, 33 N. E. 65; Com. v. Piper, 120 Mass. 185; Perkins v. Railroad, 44 N. H. 223; State v. Porter, 34 Iowa, 131, 134; Jones v. White, 11 Humph. (Tenn.) 268; State v. Sheets, 89 N. C. 543; Hook v. Stovall, 26 Ga. 704, 714. Veterinary surgeons: People v. Theobald, 92 Hun, 182, 36 N. Y. Supp. 498. Chemists: People v. Gonzalez, 35 N. Y. 49, 61; State v. Knight, 43 Me. 11, 131. Engineers and mechanics: McCaslin Mach. Co. v. McCaslin, 90 Hun, 388, 35 N. Y. Supp. 746; Joyce v. Parkhurst, 150 Mass. 243, 22 N. E. 899; Moulton v. McOwen, 103 Mass. 587; Buffum v. Harris, 5 R. I. 243. Lawyers and judges: Mowry v. Chase, 100 Mass. 79; Williams v. Brown, 28 Ohio St. 547; Thompson v. Boyle, 85 Pa. 477; Allis v. Day, 14 Minn. 516 (Gil. 388). Carpenter and builder, as to comparative strength of different kinds of timber: Kuhn v. Railroad Co., 92 Hun, 74, 36 N. Y. Supp. 339. Person familiar with floating logs: Dean v. McLean, 48 Vt. 412, 21 Am. Rep. 130. Pilot, transportation: Line v. Hope, 95 U. S. 297, 24 L. Ed. 477. Horse dealers: Miller v. Smith, 112 Mass. 470; Moreland v. Mitchell Co., 40 Iowa, 394.

[43] In City of Bloomington v. Shrock, 110 Ill. 219, 51 Am. Rep. 679, a witness gave his own opinion, without basing it on any authority. On cross-examination counsel was allowed to read extracts from certain medical authorities, and ask the witness whether he agreed with the views expressed. This was held to be erroneous, as the books could not be used to get in expert opinion evidence of a contrary nature from that expressed by the witness, unless for the purpose of contradicting him. Fox v. Color Works, 84 Mich. 676, 681, 48 N. W. 203; Tucker v. Donald, 60 Miss. 460, 45 Am. Rep. 416; City of Ri-

standard scientific and historical works are made by statute admissible as presumptive evidence of the facts they contain.[44] In such jurisdictions it is still held that knowledge and familiarity with such works and their contents as the grounds of, or to contradict, opinion evidence, are admissible without producing the works themselves.[45]

Expert Opinion—How Contradicted.

Expert opinion evidence can be met ordinarily only by contrary opinions of other experts. Where, however, the expert opinion negatives the possibility of the existence of a thing, or the doing or happening of an act, there the fact of the actual existence of such thing, or the actual doing or happening of the act, is material to show the incorrectness of the opinion.[46] So, also, where the opinion affirms the possibility of the happening of an act, the expert giving the opinion may cite particular instances within his own knowledge in support of his opinion.[47] This is, in substance, giving one of his reasons for his opinion.

pon v. Bittel, 30 Wis. 614. But see Western Assurance Co. v. Mohlman (2d Circuit, Oct. 11, 1897) 83 Fed. 811, 28 C. C. A. 157, 40 L. R. A. 561, where statements as to strength of timber contained in scientific books were admitted. Judge Lacombe states the reason as follows: "Under the rule contended for, this valuable information would be available for the use of a court of justice so long as the men who made the tests and prepared the tabulations were living and producible; but, after their death or disappearance, the information they had gathered would be lost to the court, although available for every one else in the community. We feel, therefore, no hesitancy in so modifying the general rule as to hold that, where the scientific work containing them is concededly recognized as a standard authority by the profession, statistics of mechanical experiments and tabulations of the results thereof may be read in evidence by an expert witness in support of his professional opinion, when such statistics and tabulations are generally relied upon by experts in the particular field of the mechanical arts with which they are concerned." For an interesting comment on this case, see 11 Harvard Law Rev. p. 332.

[44] Sioux City & P. R. Co. v. Finlayson, 16 Neb. 578, 20 N. W. 860, 49 Am. Rep. 724.

[45] Brodhead v. Wiltse, 35 Iowa, 429.

[46] Com. v. Leach, 156 Mass. 99, 30 N. E. 163.

[47] Donahoe v. Railroad Co., 159 Mass. 125, 34 N. E. 87.

Evidentiary Facts Forming Basis of Expert Opinion.

The opinion of an expert must either be based upon admitted facts, about which there is no dispute, or upon assumed facts, put for the purpose of obtaining an opinion, and upon the truth of which the jury may pass. If the jury determines the facts to be as assumed, the opinion will come into active operation as evidence. If they find they are not proved as assumed, the opinion will have no influence with them.

An expert may be a witness to the facts, if they are within his personal knowledge, and he may also testify to his opinion, based upon the facts as testified to by him.[48] When he is examined as an expert, it must, however, appear what his opinion is based upon. He cannot give an opinion based upon the facts as he believes them to be, unless they have been placed before the jury so that they will understand at the time the opinion is given upon what state of facts it is based.[49]

Distinction Between Evidentiary Facts and Facts Which Form the Ground of Opinion.

The evidentiary facts upon which an expert is asked to give an opinion as to a main fact in issue must be distinguished from facts, or, more properly speaking, reasons, which form the ground for his opinion. The latter he is always permitted to state in explanation of his opinion.[50] With the former, in his

[48] Faber v. Coal Co., 124 Wis. 554, 102 N. W. 1049. In this case physicians, testifying as to the nature of injuries suffered by plaintiff, were also asked whether such injuries were likely to result in recurrent troubles, or were apt to affect other organs injuriously. It will be seen that in answering these questions the witnesses assumed the character of experts, although previously testifying as witnesses to facts.

[49] Heald v. Thing, 45 Me. 392.

[50] In Eidt v. Cutter, 127 Mass. 522, the action was by A. v. X. for injuries caused to A.'s house and fence by the fumes, vapors, and gases escaping from X.'s copperas works, and discoloring the paint on the house and fence. A. introduced experts, who testified that the condition of the house and fence could be, and was, in their opinion, brought about by the said fumes. The witnesses were permitted to give as the reasons for their opinions an account of certain experiments made by them, which, under similar conditions, produced similar results. In McLeary v. Norment, 84 N. C. 235, the question as to the statement of the grounds of a witness' opinion as to sanity came up in a peculiar way. The suit was by A. to set aside

expert capacity, he has nothing to do, except to assume them as they are stated to him hypothetically, or as they are called to his attention as having been previously testified to. He is not to give his opinion as to their truth or falsity.[51]

HYPOTHETICAL QUESTIONS.

140. The hypothetical question is the most approved form of calling for the opinion of an expert witness.

In the examination of those witnesses who are called as experts, pure and simple, and who have no personal knowledge of the facts, the most generally accepted form of question is to state certain facts, as assumed, and ask the witness for his opinion thereon.[52] The advantage in this form of question is

a conveyance made by her to X. on the ground of mental incapacity at the time the deed was executed. X. having died, the suit was against his heirs. A niece of A. testified to A.'s want of capacity to make a deed, and stated that her opinion was formed from conversations and communications between A. and herself. It was proposed to show what these conversations were, but they were objected to and excluded. The higher court held that they should have been admitted, not for the purpose of showing the truth of the things stated, but as showing the grounds upon which the witness' opinion was based. It was also held that they were not within the prohibition of a statute by which a living witness is not permitted to testify to a conversation when the other party to it is dead or insane. The conversations, so far as they were irrational, were in themselves evidence of insanity, and were really admissible, even though the witness had stated no opinion. In fact, they would ordinarily have been admitted first, and the witness then allowed to give her opinion upon them.

[51] Butler v. Insurance Co., 45 Iowa, 93, 98.

[52] Miller v. Smith, 112 Mass. 470, 475; Walker v. Rogers, 24 Md. 237, 243; Spear v. Richardson, 37 N. H. 23, 34; Louisville, N. A. & C. Ry. Co. v. Wood, 113 Ind. 544, 14 N. E. 572, and 16 N. E. 197; Southern Bell Tel. & Tel. Co. v. Jordan, 87 Ga. 69, 72, 13 S. E. 202; Hall v. Rankin, 87 Iowa, 261, 54 N. W. 217. In Hardiman v. Brown, 162 Mass. 585, note, 39 N. E. 192, a hypothetical question as put to a practicing physician of long experience is set out in full. It is here printed as furnishing an illustration of the manner in which such questions are put. The subject of the inquiry was the cause of an illness which resulted in the death of a child. The question was: "Suppose a girl between seven and eight years of age, who had always

that it gets before the jury exactly the facts upon which the opinion is founded. Where an expert witness has heard the evidence, it might be thought that it would be simpler to ask his opinion upon the facts as proved, but this would be objectionable, for the reason that the jury alone are to determine what facts are proved. To leave it to the witness to do this, and to express his opinion upon such facts as he may deem proved, is objectionable, for the reason that in the minds of the jury a different state of facts may seem to have been proved from the facts which are in the mind of the witness. Under these circumstances, the jury cannot tell what weight the opinion is entitled to.

The statement of the facts constituting the hypothetical question must comprise those facts upon which an opinion is wanted, stated as the party putting the question conceives them to have been proved by the evidence.[53] The nearer they come to

been in good health, on the 9th of January, 1887, to have been run over by a runaway horse, with sleigh attached, to have been knocked insensible to the ground, the horse and sleigh passing over her, inflicting three cuts, one upon the top, one upon the side, and one upon the back of her head, from the hoofs of the horse or otherwise; that she thereafter was attacked with vomiting, and was confined to the house for two months, suffering great pain in the back and front of the head; that at intervals thereafter, increasing in frequency and intensity till the date of her death, on May 18, 1892, she was attacked with violent pains in the head, accompanied with vomiting; that in the last few months of her life her sight gradually failed, and she became totally blind; that her legs became unsteady, and her control over them uncertain; that she suffered almost continually great pain in the front and back of her head; that after her death, on examination, it was found that she had one or more tumors of the cerebellum, or at the base of the brain—what, in your opinion, was the exciting cause of the illness from which she suffered from January 9, 1887, the date of the accident, till the date of her death, May 18, 1892?"

[53] People v. Tuczkewitz, 149 N. Y. 240, 43 N. E. 548; People v. Harris, 136 N. Y. 423, 453, 33 N. E. 65; In re Will of Norman, 72 Iowa, 84, 33 N. W. 374; Abbot v. Heath, 84 Wis. 314, 319, 54 N. W. 574. In Cowley v. People, 83 N. Y. 464, 38 Am. Rep. 464, Folger, C. J., says (page 470): "The claim is that a hypothetical question may not be put to an expert unless it states the facts as they exist. It is manifest, if this is the rule, that in a trial where there is a dispute as to the facts, which can be settled only by the jury, there

the facts as they appear to the jury, the greater the weight which the witness' opinion will have. It is not necessary that the question include the substance of all the testimony given.[54] All that is required is that the question shall be a fair statement of the salient facts upon which an opinion is wanted. The prevailing doctrine is that the witness cannot be asked his opinion upon the evidence in the case as he has heard it given.[55] This would be leaving to him to determine for him-

would be no room for a hypothetical question. The very meaning of the word is that it supposes—assumes—something for the time being. Each side in an issue of fact has its theory of what is the true state of facts, and assumes that it can prove it to be so to the satisfaction of the jury, and, so assuming, shapes hypothetical questions accordingly. And such is the correct practice."

[54] Stearns v. Field, 90 N. Y. 640; Louisville, N. A. & C. Ry. Co. v. Wood, 113 Ind. 544, 554, 14 N. E. 572; State v. Hayden, 51 Vt. 296; Hall v. Rankin, 87 Iowa, 261, 54 N. W. 217; Bowen v. City of Huntington, 35 W. Va. 682, 689, 14 S. E. 217.

[55] In reference to a question of this sort, the Court of Appeals in New York says (People v. McElvaine, 121 N. Y. 250, 255, 24 N. E. 465, 466, 80 Am. St. Rep. 820): "We cannot doubt but that the question was improper. The witness was thus permitted to take into consideration all the evidence in the case given upon a long trial extending over nine days, and, upon so much of it as he could recollect, determine for himself the credibility of the witnesses, the probability or improbability of their statements, and, drawing therefrom such inferences as, in his judgment, were warranted by it, pronounce upon the sanity or insanity of the defendant. It cannot be questioned but that the witness was by the question put in the place of the jury, and was allowed to determine upon his own judgment what their verdict ought to be in the case." See extracts from early cases cited in Thayer, Cas. Ev. (2d Ed.) p. 717. But it has been held that, where the witness has heard the testimony, instead of repeating it in the hypothetical question he may be asked his opinion, assuming the facts testified to to be true. When the facts involved are simple, and have been given immediately before the expert is put on the stand, there may not be any objection to this form of putting a hypothetical question; but, if they are complicated, and testified to by many witnesses, it is open to the objection that the witness may not remember all the facts, or at least not remember the facts as remembered by the jury. See Wright v. Hardy, 22 Wis. 348. The courts sometimes go to the extent of allowing the opinion of the witness to be asked upon the evidence introduced. Thus, in Schneider v. Manning, 121 Ill. 377, 387, 12 N. E. 267, 271, the question was: "Having heard that evidence on the part of the contestants, state whether or not, in your opinion, from a medical standpoint, from that evidence, Hugh Mc-

self what facts he would consider proved. On these facts he would base his opinion, and give what, in substance, would be a verdict on the evidence, which would be highly objectionable. On the contrary, if he be asked for his opinion, assuming certain facts to be true, it is left entirely with the jury to determine whether such facts are proved. If the jury believe the facts assumed, they may then make use of the opinion to aid them in reaching a correct result. When the facts are not in dispute, it has been held that that question based on the evidence in the case is proper.[56]

DAMAGES AS THE SUBJECT OF OPINION EVIDENCE.

141. The question of damages is for the jury to determine, and is not properly the subject of expert testimony.

In the ordinary case, where the plaintiff seeks compensation in damages either for breach of contract, or for an injury resulting from some wrong, the question of the amount to which he is entitled is the final question which the jury have to pass upon. It is the thing which is peculiarly within their province, and the thing in reference to which they must rely exclusively upon their own opinion.[57] There is no trade or profession

Glennon was of sound or unsound mind on September 6, 1879." A similar question was allowed in Hand v. Inhabitants of Brookline, 126 Mass. 324; Jones v. Railway Co., 43 Minn. 279, 45 N. W. 444; Seymour v. Fellows, 77 N. Y. 178. In Gates v. Fleischer, 67 Wis. 504, 30 N. W. 674, the question was based partly on facts stated, and reference was made to the testimony heard by the witness for the balance of facts.

[56] McNaghten's Case, 10 Clark & F. 200, 211; Hunt v. Gaslight Co., 8 Allen (Mass.) 169–172, 85 Am. Dec. 697; Tingley v. Cowgill, 48 Mo. 291, 298; Page v. State, 61 Ala. 16.

[57] In Lincoln v. Railroad Co., 23 Wend. (N. Y.) 425, A. sued X. for damages for injuries incurred while he was a passenger on X.'s cars. Upon the question of amount of damages A. showed that he was a member of a mercantile firm carrying on a large business, and that as the senior partner he controlled the firm's affairs; that the injury kept him from attending to them during the busiest season, and then put in the opinions of other business men as to the amount of damages plaintiff must have sustained by reason of his absence. This was held erroneous. The court say (page 434): "Where men

which furnishes a skill or knowledge which can better arrive at a fair conclusion than the experience and knowledge of twelve citizens of average intelligence; at least, this is the theory of the jury system. There are questions of damages, dependent, by some rule of law, upon subsidiary questions of value of property, and upon these latter questions persons specially qualified are often called upon for opinions, so that opinions of experts as to values may furnish the basis upon which the jury arrives at a measure of damages. In thus giving an opinon as to value, which value, by rule of law, is imposed upon the jury as a measure of damages, a witness is in substance, if not in form, speaking to the question of damages. Cases where the damage consists in the plaintiff being deprived of property either by breach of contract or tort may involve a determination of the value of the property in order to fix the damages. Expert opinion is in such case admitted.[58]

of science or skill have been allowed to express their opinion upon a given or admitted state of facts, if of equal standing or intelligence, there may be expected something like general concurrence. * * * In the case before us no such accuracy is attainable, or can be predicated upon the facts on which the opinions are expressed. There may be a tolerable conjecture of the amount of damage, and merchants in the same line of business with the plaintiff, and residing in his vicinity, might carry it nearer to the truth than others; but their opinions can rise no higher than mere conjecture. * * * Even with the jury the damage beyond the actual expenses can at best rise but little above conjecture. * * * The most they can do is to bring to the discharge of their duties a careful and diligent consideration of the particular case, a knowledge and experience of the general condition and business affairs of mankind, to which all are more or less subject, a sound and enlightened judgment, and honest desire to arrive at truth and justice between the parties. No more can be expected, no less justified. The result will usually be an approximation to reasonable indemnity, as near as the imperfections of human tribunals will admit." See, also, Morehouse v. Mathews, 2 N. Y. 514; Old v. Keener, 22 Colo. 6, 43 Pac. 127.

[58] In Vandine v. Burpee, 13 Metc. (Mass.) 288, 46 Am. Dec. 733, Dewey, J., says (page 291 of 13 Metc. [46 Am. Dec. 733]): "It seems to us that it would be impracticable to dispense with this species of testimony in many actions of trover for personal property, where no detail of facts could adequately inform the jury of the value of the articles. The opinion of a witness as to the value of a horse is much more satisfactory evidence than a detailed statement of his size, color, age, etc., to give the jury the requisite information to en-

Cases where the loss consists in an injury to property not amounting to a total destruction or deprivation present greater difficulties. Here the question of damages involves the difference between value before and after the injury. The courts, to preserve the letter of the rule, refuse to allow expert opinion testimony as to what the damage is, but insist that it shall be confined to what the respective values were before and after the injury, leaving it to the jury to perform the somewhat formal task of the sum in subtraction.[59]

able them to assess damages for the conversion of such a horse." Miller v. Smith, 112 Mass. 470, in which Gray, J., says (page 475): "Whenever the value of any peculiar kind of property, which may not be presumed to be within the actual knowledge of all jurors, is in issue, the testimony of witnesses acquainted with the value of similar property is admissible, although they have never seen the very article in question." Vagts v. Utman, 125 Wis. 265, 104 N. W. 88; McGroarty v. Coal Co., 212 Pa. 53, 61 Atl. 570.

[59] In Roberts v. Railroad Co., 128 N. Y. 455, 467, 28 N. E. 486, 13 L. R. A. 499, referring to this class of questions, it is suggested that there is a real difference between the two methods; and there might be were it not for the fact that the witness, if permitted to state what amount of damages the plaintiff had sustained, would be confined in his estimate to difference between the two values. The language of the opinion is: "And yet in a case where the difference between the two would be the legal damages, it does not even then follow that a witness may be asked the bald question, 'What amount of damages has the plaintiff sustained?' The reason is that the rule of damages is a question of law, and the witness upon such a question might adopt a rule of his own, and hold the defendant responsible beyond the legal measure." But see Vandine v. Burpee, 13 Metc. (Mass.) 288, 46 Am. Dec. 733, where upon the issue as to the damage done to a nursery by fire and smoke the question was allowed; but this was after the witness had testified fully as to the facts of the injury done. In Parrott v. Ry. Co., 127 Iowa, 419, 103 N. W. 352, the witness was allowed to state the difference between the values of the land before and after the injury, without first having stated the said values. Union Pac. R. Co. v. Lucas, 136 Fed. 374, 69 C. C. A. 218.

It is upon this principle that the decisions in the following cases may be rested: Lake Shore & M. S. Ry. Co. v. Teeters (Ind. App.) 74 N. E. 1014; Patterson v. Johnson, 114 Ill. App. 329; Enlow v. Hawkins, 71 Kan. 633, 81 Pac. 189; Texas & P. Ry. Co. v. Ellerd (Tex. Civ. App.) 87 S. W. 362; Atchison, T. & S. F. Ry. Co. v. Watson, 71 Kan. 696, 81 Pac. 499.

SANITY AS THE SUBJECT OF EXPERT OPINION.

142. The question of sanity forms an important subject of expert testimony. Expert opinion, in its narrowest sense, is admissible upon this question.

143. Opinions of persons qualified by observation are also held admissible in most jurisdictions, though in some it is held that they can only be given after, or in connection with, testimony as to the facts on which they are based.

Sanity is a fact which may be proved in different ways. The skilled alienist, who has made a special study of mental diseases, may be eminently qualified to give an opinion, from certain proved facts, as to whether a person is or is not sane, and his opinion may have great weight with the jury. This does not, however, render of less value the opinion of one who has had a peculiar opportunity for observation of the person whose sanity is in question, and who, from that observation, whether he be a physician or layman, has formed that opinion. A family physician is permitted to give his opinion as to the sanity of a patient, and he is often spoken of as an expert.[60] If his opinion is based on his observation, and he has no special skill fitting him to give such opinion, he is in the same position as any intelligent person who has had the same facilities for observation, and is not an expert.

In all jurisdictions, expert opinion is held admissible upon the subject of sanity, and it is the most common, though, in the refinements of expert testimony which have developed, not always the most satisfactory, method of proof. In almost all jurisdictions, opinions of ordinary observers who have been acquainted with the person whose sanity is under examination are admitted.[61] This is on the very reasonable theory that persons of ordinary intelligence, accustomed to associate in a business and social way with the person in question, are pecu-

[60] May v. Bradlee, 127 Mass. 414, 421; Hall v. Perry, 87 Me. 569, 577, 33 Atl. 160, 47 Am. St. Rep. 352; State v. Meyers, 99 Mo. 107, 121, 12 S. W. 516.

[61] Connecticut Mut. Life Ins. Co. v. Lathrop, 111 U. S. 612, 4 Sup. Ct. 533, 28 L. Ed. 536.

liarly qualified to judge of his mental capacity; that their judgment, based upon innumerable facts and circumstances impossible to detail to a jury, but which, as making up his daily life, in its outward mental and physical expression, are particularly valuable, is often more apt to be reliable than the opinion of experts, based, as is ordinarily the case, upon a meager outline of the facts hypothetically stated, or special examination of the person at infrequent intervals and for short periods of time.

In many jurisdictions the evidence is admitted without requiring the facts upon which the opinion is based to be stated, all that is required being that it shall appear that the witness was sufficiently qualified by observation and acquaintance to make his opinion valuable.[62] In other jurisdictions the evidence is admitted only after, or in connection with, the facts upon which it is founded, and the facts must be such as reasonably justify the opinion given by the witness. If they do not, he will not be allowed to give his opinion.[63] In New York, Massachusetts, and Maine, the evidence is not allowed at all;

[62] In Hardy v. Merrill, 56 N. H. 227, 22 Am. Rep. 441, will be found a long and exhaustive examination of the cases, with the result that on principle and authority the opinion of ordinary observers without necessarily detailing facts on which it is based, is held admissible. To the same effect are Hathaway's Adm'r v. National Life Ins. Co., 48 Vt. 335, 350; Newcomb's Ex'r v. Newcomb, 96 Ky. 120, 123, 27 S. W. 997; Clary's Adm'rs v. Clary, 24 N. C. 78; Territory v. Hart, 7 Mont. 489, 498, 17 Pac. 718; State v. Lewis, 20 Nev. 333, 345, 22 Pac. 241; Estate of Brooks, 54 Cal. 471.

[63] Hibbard v. Baker, 141 Mich. 124, 104 N. W. 399; Missouri, K. & T. Ry. Co. v. Allen (Tex. Civ. App.) 87 S. W. 168; Williams v. Lee, 47 Md. 321; Stackhouse v. Horton, 15 N. J. Eq. 202, 208; Yardley v. Cuthbertson, 108 Pa. 395, 449, 1 Atl. 765, 56 Am. Rep. 218; Cropp v. Cropp, 88 Va. 753, 759, 14 S. E. 529; Johnson v. Culver, 116 Ind. 278, 289, 19 N. E. 129; Smith v. Hickenbottom, 57 Iowa, 733, 11 N. W. 664; State v. Williamson, 106 Mo. 162, 170, 17 S. W. 172; Upstone v. People, 109 Ill. 169, 175; Rice v. Rice, 50 Mich. 448, 15 N. W. 545; Stubbs v. Houston, 33 Ala. 555, 564; Scalf v. Collins Co., 80 Tex. 514, 16 S. W. 314; Denver & R. G. R. Co. v. Scott, 34 Colo. 99, 81 Pac. 763; Howard v. Carter, 71 Kan. 85, 80 Pac. 61. In Welch v. Stipe, 95 Ga. 762, 22 S. E. 670, even a mother was not allowed to testify that a deceased daughter was not in her right mind, without giving the circumstances upon which her opinion was based.

the witness being confined to a description of the acts, and a statement as to whether such acts, in his opinion, were those of an irrational person.[64]

There is another class of testimony, which cannot be classed as expert testimony, and yet does not stand on the same footing with that of ordinary observers. It is the testimony of the subscribing witnesses to a will. The question of sanity arises, perhaps, more often than anywhere else, in cases where the competency of a testator to make a will is brought in issue. In these cases the subscribing witnesses stand in a somewhat peculiar position with respect to qualification to testify as to the testator's sanity. "The witnesses are chosen by the testator, and are thereby, under the law, charged with an important duty in relation to the execution and proof of the will. It may be presumed that, in the performance of that duty, they will observe carefully the appearance of the testator at the time, and form an opinion as to his sanity. That opinion naturally and properly may determine their action in signing or refusing to sign as witnesses."[65] Even in jurisdictions where opinions of ordinary observers are excluded, those of subscribing witnesses, formed at the time of the execution of the will, are admitted;[66] but, with respect to opinions formed afterwards, subscribing witnesses are, in such jurisdictions, held to be on the same footing with other nonexpert witnesses.[67]

[64] The rule in New York is confined to statements as to the acts, conversations, or looks of the party as to whether they were, in the opinion of the witness, irrational; in other words, it is confined to cases where the witness testifies to one of that class of facts heretofore described, commonly called "impressions." Ante, p. 220; Paine v. Aldrich, 133 N. Y. 544, 30 N. E. 725; People v. Strait, 148 N. Y. 566, 42 N. E. 1045; Smith v. Smith, 157 Mass. 389, 32 N. E. 348; Wyman v. Gould, 47 Me. 159.

[65] Knowlton, J., in Williams v. Spencer, 150 Mass. 346, 23 N. E. 105, 5 L. R. A. 790, 15 Am. St. Rep. 206; Titlow v. Titlow, 54 Pa. 216, 222, 93 Am. Dec. 691; Walker v. Walker, 34 Ala. 469; Garrison v. Blanton, 48 Tex. 299, 303.

[66] Clapp v. Fullerton, 34 N. Y. 190, 90 Am. Dec. 681; Hastings v. Rider, 99 Mass. 622.

[67] Williams v. Spencer, supra.

HANDWRITING AS THE SUBJECT OF EXPERT TESTIMONY.

144. Opinion evidence is admissible to prove handwriting.

145. A person is considered qualified to testify to handwriting when he has seen the person whose handwriting is in question write, or, in the ordinary course of business, has become familiar with such person's handwriting, through the receipt of communications purporting to be written by him, or because he is specially skilled in the subject of handwriting, by reason of special study of the subject.

The subject of handwriting is one which may be taken up to better advantage in connection with the discussion of the law of evidence relating to documents. It should, however, be mentioned here as another real exception to the rule excluding opinion evidence. The reason for the exception is plain. Unless a signature or writing has been made in the presence of a witness who can afterwards identify it, the only possible proof of handwriting is opinion evidence, and opinion evidence of persons specially qualified to testify. We thus have in the proof of handwriting the same two classes of expert testimony which have been before referred to,—that which is based on observation, and that which is based on a special training or education upon a particular subject. There is some difference of opinion in the authorities as to just how much familiarity from observation will qualify a witness to give his opinion as to handwriting. The general rule, however, is that having seen the person write once specially qualifies the witness.[68] But, upon the entire examination of the witness as to his qualification,

[68] That having seen the party write once is sufficient. Com. v. Nefus, 135 Mass. 533; Hammond v. Varian, 54 N. Y. 398; Frank v. Berry, 128 Iowa, 223, 103 N. W. 358. The fact of having seen the party write once is not sufficient qualification if the witness states he did not know the handwriting. Nelms v. State, 91 Ala. 97, 9 South. 193. The mark of a party to an instrument has been held to be the same as handwriting with regard to manner of proof. Strong's Ex'rs v. Brewer, 17 Ala. 706. Also writing in cipher. Com. v. Nefus, 135 Mass. 533. It is sufficient if the witness has seen the party write after the date of the writing in dispute, Keith v. Lothrop, 10 Cush. (Mass.) 453; but not if the party wrote in the pres-

it must appear that he is fairly acquainted with the handwriting. Upon the witness' opportunity for observation and familiarity of the handwriting will depend the weight, rather than the admissibility, of his testimony.[69] The mere fact of having seen the person write, if the witness does not have sufficient education or intelligence to himself read the writing, will not qualify him.[70] The receipt of written communications which have been acted upon as genuine by the party receiving them is universally held to be sufficient to qualify the witness.[71]

In the proof of handwriting by opinions of specially qualified experts, another element enters into the testimony, namely, that of comparison of handwriting—comparison of the specimen in question with an admittedly genuine specimen. An opinion of an expert, based upon a careful comparison by him of the disputed writing with a genuine specimen, is generally held admissible.[72] An ordinary witness cannot testify from compari-

ence of the witness for the purpose of enabling him to testify, Territory v. O'Hare, 1 N. D. 30, 44 N. W. 1003.

[69] Frank v. Berry, 128 Iowa, 223, 103 N. W. 358.

[70] For a careful discussion of requirements necessary to qualify a witness where testimony is offered on the theory that he has seen the person write, see opinion of Martin, J., in People v. Corey, 148 N. Y. 476, 42 N. E. 1066. But see Foye v. Patch, 132 Mass. 105. The question is also ably discussed in Woodman v. Dana, 52 Me. 9. See, also, Burnham v. Ayer, 36 N. H. 182; State v. Scott, 45 Mo. 302.

[71] Cunningham v. Bank, 21 Wend. (N. Y.) 557; Chaffee v. Taylor, 3 Allen (Mass.) 598; Riggs v. Powell, 142 Ill. 453, 32 N. E. 482; Pearson v. McDaniel, 62 Ga. 100; Campbell v. Iron Co., 83 Ala. 351, 3 South. 369; Atlantic Ins. Co. v. Manning, 3 Colo. 224; Southern Exp. Co. v. Thornton, 41 Miss. 216; Melby v. Osborne, 33 Minn. 492, 24 N. W. 253; Ullman v. Babcock, 63 Tex. 68. It is necessary that the letters be in the ordinary course of business, and that the witness has relied upon them in the business matters to which they relate. Pinkham v. Cockell, 77 Mich. 265, 43 N. W. 921.

[72] Miles v. Loomis, 75 N. Y. 288, 31 Am. Rep. 470; Carter v. Jackson, 58 N. H. 156; Bell v. Brewster, 44 Ohio St. 690, 10 N. E. 679; State v. Thompson, 80 Me. 194, 13 Atl. 892, 6 Am. St. Rep. 172; State v. Ward, 39 Vt. 225, 233; Vinton v. Peck, 14 Mich. 287; Hanriot v. Sherwood, 82 Va. 1. See Moody v. Rowell, 17 Pick. (Mass.) 490, 28 Am. Dec. 317, for a careful discussion of the three kinds of handwriting evidence mentioned in this section, with the conclusion that all three are admissible. The English common-law doctrine with regard to the subject will be found discussed fully in Doe v. Suckermore, 5 Adol. & E. 703. The judges in that case were evenly di-

son. The rule is confined strictly to experts.[73] It is also held that an expert may, without resort to comparison, testify to the genuineness of the handwriting direct; that is, he may give an opinion as to whether it is a natural or simulated hand.[74]

The submission of genuine specimens to the jury, for the purpose of having them make a comparison with the disputed handwriting, may have come about through the practice of allowing the jury to make the comparison where admittedly genuine specimens were introduced in evidence for other purposes, or where they were a part of the records in the case. The cases seem to be uniform in allowing the comparison to be made under such circumstances—possibly for the reason that, such specimens "being before the jury, it is hardly possible to pre-

vided (Lord Denman and Mr. Justice Williams favoring, and Justices Coleridge and Patteson opposing) upon the question of admitting the testimony of an expert who had made an examination of admittedly genuine specimens on the first day of the trial, and was called to testify on the second, and at that time stated that he thought he had acquired a knowledge of the handwriting in question sufficient to enable him to tell whether any particular specimen was genuine. The judges, however, recognize with unanimity the well-established English common-law doctrine that comparison of hands by the jury or by witnesses will not be allowed upon specimens introduced for that purpose. For purposes of comparison it is held that only original specimens may be used; press copies will not do. Com. v. Eastman, 1 Cush. (Mass.) 189, 217, 48 Am. Dec. 596. See West v. State, 22 N. J. Law, 212; Riggs v. Powell, 142 Ill. 453, 32 N. E. 482; Tuttle v. Rainey, 98 N. C. 513, 4 S. E. 475; Territory v. O'Hare, 1 N. D. 30, 44 N. W. 1003—to the effect that handwriting may not be proved by comparison of hands. It is sometimes held that comparison will be allowed in the case of ancient documents, though not otherwise, on the theory that in such cases it cannot be proved in any other way. Fee v. Taylor, 83 Ky. 259.

[73] Woodman v. Dana, 52 Me. 9, 15; Griffin v. State, 90 Ala. 596, 8 South. 670; In re Burbank's Will, 104 App. Div. 312, 93 N. Y. Supp. 866.

[74] Doe v. Suckermore, 5 Adol. & E. 703, 751. Lord Denman, in this case, speaks thus of this class of evidence: "On the question whether handwriting, looked at by itself, is genuine or forged, the cases appear to me to have justly exploded the notion that bare inspection by the most skillful person can furnish means for forming an opinion. * * * I do not, indeed, understand how such evidence could be rejected, if a witness should swear that his habits gave him the requisite skill; but I do not think that either court

vent a comparison being instituted." [75] The English common-law doctrine was that specimens of handwriting irrelevant to the issues in the case would not be admitted solely for the purpose of enabling the jury to compare them with the writing in dispute,[76] and this was adopted as the proper rule by the United States Supreme Court.[77] Under the general American doctrine, however, such comparison is allowed.

or jury would believe him, or place the least reliance on his opinions. Practically therefore this chapter may be considered as expunged from the book of evidence." See Sudlow v. Warshing, 108 N. Y. 520, 15 N. E. 532.

[75] Patteson, J., in Doe v. Suckermore, 5 Adol. & E. 703, 734; Moore v. U. S., 91 U. S. 270, 23 L. Ed. 346; State v. Minton, 116 Mo. 605, 614, 22 S. W. 808.

[76] Doe v. Newton, 5 Adol. & E. 514.

[77] Moore v. U. S., 91 U. S. 270, 23 L. Ed. 346.

Opposite page 253
McKelvey on Evidence.

DEPARTMENT OF LAW

Hearsay

Hearsay evidence is inadmissible. That is to say, a witness who has received from some one else, by word or writing, a narrative of facts, even though they be the very facts to be proved, is not allowed to give this narrative in evidence.

Exceptions

- EXCEPTIONS
  - Apparent
    1. Statements in issue.
    2. Statements—the making of which is circumstantial evidence.
    3. Market value.
    4. Reputation.
  - Real
    - Because of the difficulty of obtaining other proof.
      1. Last will.
      2. Ancient ownership.
      3. Pedigree.
      4. Age of persons.
      5. Matters of a public nature.
    - Because of special reliability.
      1. Declarations under oath.
      2. Declarations in regular course of business.
      3. Declarations against interest.
      4. Dying declarations.
      5. Matters of public and general interest.
      6. Res gestæ.
      7. Admissions.
      8. Confessions.

In general, all statements submitted as evidence in judicial proceedings should be subject to the following three tests of reliability:

1. The statement must be made under the moral obligation of an oath, or affirmation, with the liability to prosecution for perjury in case of falsehood.

2. The witness must give his testimony in open court in order that the jury may observe his demeanor while giving it.

3. The party against whom the testimony is given must have the opportunity of *cross-examining* the witness, in order to elicit his sources of information as well as any material facts within his knowledge which he may not be disposed to disclose voluntarily, and also to test the general accuracy of his statements, and to show if he has any bias in regard to the matter in dispute.

If hearsay were admitted the *real* witness would have none of the above tests applied to his statement. When exceptions are allowed there must be some reason why it is wise to do without any or all of the above three tests.

H. A. WHITE.

CHAPTER XI.

HEARSAY.

146. Statement of General Rule.
147. Apparent Exceptions—Statements in Issue.
148. Statements the Making of Which is Circumstantial Evidence
149. Market Value and Reputation.
150. Real Exceptions to General Rule Against Hearsay—Statements Admitted Because of the Difficulty of Other Proof.
151. Declarations of Testator as to Contents of Will.
152. Declarations Concerning Ancient Ownership.
153. Matters of Pedigree.
154. Kinds of Declarations Admissible.
155. By Whom Declarations Must be Made.
156–157. Proof as to Declarant's Connection with Family.
158. Extent of Rule.
159. Admissibility as Affected by Time of Making Declarations.
160. Proof of Age of Person.
161. Matters of a Public Nature.
162. Statements Admitted Because of Circumstances Giving Them Special Reliability.
163. Declarations Made Under Oath.
164. Conditions Under Which Declarations Under Oath are Admissible.
165. Identity of Parties.
166. Disabilities Which are Recognized.
167. Manner of Proof of Declarations.
168. Precise Language Not Necessary.
169. Extension of Rule.
170. Declarations Made in the Regular Course of Business.
171. Shop-Book Rule.
172. American Doctrine.
173. Entries Must be Original.
174. Rule Confined Strictly to Shop Books.
175. Death Not Essential to Admissibility.
176. Authentication of Entries.
177. Extension of Rule.
178. Rule Restricted as to Amount Involved.
179. Scope of Proof.
180. Entries Made by Strangers.
181. As to Oral Declarations.
182. Meaning of "Regular Course of Business."

183. Must be Contemporaneous.
184. By Whom Entries Made.
185. What Disabilities Sufficient.
186. Declarations Against Interest.
187. Declarations Must have been Spontaneous.
188. Must be Against Pecuniary or proprietary Interest.
189. Death a Prerequisite.
190. Kind of Declarations Admitted.
191. Scope of Declaration as Evidence.
192. Admissibility to be Determined by the Court.
193. Dying Declarations—Ground of Admissibility.
194. Expectation of Immediate Death.
195. In What Cases Admissible.
196. By Whom Must have been Made.
197. To What Declarations Must Relate.
198. Competency.
199. Form of Declaration Immaterial.
200. Court to Determine Admissibility.
201. Matters of Public or General Interest—General Rule.
202–204. Distinction Between Public Interest and General Interest.
205. Two Kinds of Hearsay Admissible.
206–207. Public Documents and Books.
208. Declarations Which are Part of the Res Gestæ.
209. Must be Contemporaneous.
210. Cases Not Belonging Under this Head.

STATEMENT OF GENERAL RULE.

146. Statements, oral or written, made by persons not parties to the suit, and not witnesses therein, are not admissible to prove the truth of the facts stated, except in two classes of cases:

(a) Where they are rendered necessary by the difficulty of other proof.

(b) Where the circumstances under which they are made furnish some guaranty of their reliability, other than the mere fact of their having been made.

The above is a statement of the rule of evidence commonly called the "rule against hearsay," and perhaps is as satisfactory a statement as any. It is a rule which has been so broadly, and again so narrowly, stated as to render it somewhat difficult to put it in a form which will be brief, and at the same time cover

the principles generally recognized in the cases.[1] The rule has arisen with the development of the law of evidence, as one of the rules which is supposed to keep from the jury matter, the nature and effect of which they are not qualified to properly estimate. It would seem that the rule against hearsay had no existence before the development of the modern jury system.[2] And it was probably never recognized as a rule of uni-

[1] Stephen, in his Digest of the Law of Evidence (article 14), to conform the rule to the theory of relevancy, upon which his whole work is based, is obliged to put it somewhat awkwardly: "The fact that a statement was made by a person not called as a witness, and the fact that a statement is contained or recorded in any book, document, or record whatever, proof of which is not admissible on other grounds, are, respectively, deemed to be irrelevant to the truth of the matter stated, except (as regards [a]) in the cases contained in the first section of this chapter, and except (as regards [b]) in the cases contained in the second section of this chapter." Greenleaf (Evidence [15th Ed.] par. 99) defines hearsay as "that kind of evidence which does not derive its value solely from the credit to be given to the witness himself, but rests also, in part, on the veracity and competency of some other person." As a definition, this is so broad as to include many classes of testimony which have nothing to do with the rule against hearsay. See Chamberlayne's Best, Ev. (8th Ed.) p. 444. The following facts present a common case for the application of the hearsay rule: A. v. X. for conversion of personal property. X., a constable, seized the property under a levy on a judgment against A.'s father. A. testified he was the owner, and offered in evidence receipts showing payment by him of the rent of the premises where the goods were kept. The receipts are hearsay, being nothing more than the unsworn statements of the party giving them. Silverstein v. O'Brien, 165 Mass. 512, 43 N. E. 496.

[2] Thayer, in his Cases on Evidence (2d Ed., pages 313–315), has collected a number of cases showing the old ideas in respect to this class of evidence. There seems to have been no idea that it was inadmissible in 1554. Thomas' Case, 1 Dyer, 99b, pl. 68. But a century later (1 Hale, P. C. 306) Sir Matthew Hale says that the opinion expressed in Thomas' Case was rejected by all the judges. In Sir Walter Raleigh's Case (1603) 1 Jard. Cr. Trials, 429, 430, and again in Lutterell v. Reynell (1670) 1 Mod. 282, it was held admissible to confirm the testimony of a witness given at the trial by statements made before. In the latter case the lord chief baron said, "though a hearsay was not to be allowed as a direct evidence, yet it might be made use of to this purpose, viz., to prove that William Maynard was constant to himself, whereby his testimony was corroborated." Other cases referred to by Thayer in the same line are Re Friend's Case (1692) 13 How. St. Trials, 31, 32; Style, Prac. Reg. (Ed. 1670) 1731.

versal application. It was not one of those rules which, finding their reason in some condition of the period, are at first rigidly enforced, but afterwards suffer numerous curtailments through exceptions made necessary by changing conditions. In fact, the rule against hearsay may be called a principle, rather than a rule. It is convenient to state it as a broad rule, and to treat those matters to which the principle of exclusion has not been extended as exceptions, but it is well to understand that this is rather a particular method of treatment than a classification made necessary by the nature of the subject. The old cases show that many of the instances which are now regarded as exceptions to the hearsay rule are only survivals of the old law in regard to the admission of this class of evidence, and prove that the rule was always subject to limitations. Declarations of deceased persons, entries in tradesmen's books, and ancient deeds are illustrations of this.[3]

By 1783 the doctrine laid down in Lutterell v. Reynell had been repudiated. Rex v. Parker, 3 Doug. 244. In Style, Prac. Reg. (4th Ed., 1707) p. 250, it is said: "A person that may be admitted as a witness at a trial may give words in evidence to the jury which were spoken to him by another person, who by the rules of the court might not be admitted as a witness at the trial. Mich. 22 Car. B. R. For it is but matter of evidence, and is left to the jury how far they will give credit to them, and it is lawful for one that is admitted as a witness to give anything in evidence which may concern the matter in question." For an exhaustive treatise on the early history and development of hearsay rule, see an article by Prof. John H. Wigmore in 17 Harvard Law Rev. 437.

[3] In Style, Prac. Reg. (4th Ed., 1707) p. 247, we find the following: "In an information of perjury, to prove the perjury, one was produced, to what one since dead swore upon the first trial, and allowed good evidence." And on page 253: "An ancient writing that is proved to have been found amongst deeds and evidences of land may be given in evidence to a jury, although the executing of it cannot be proved. Mich. 24 Car. B. R. For it is very hard to prove things which are very ancient, and the finding it in such a place is a presumption that it was preserved as a thing of value, and to be made use of, and is left to the jury what credit they will give to it according to circumstances." Dockwray v. Dickenson, Comb. 366, 367. Here, when the question was as to what a cargo consisted of, the bill of lading signed by the captain, who was dead, was allowed.

APPARENT EXCEPTIONS—STATEMENTS IN ISSUE.

147. Statements, oral or written, the making of which is a material fact in dispute, are not hearsay. A witness may testify to the hearing of such statements, if oral; or, if written, the statements may be introduced.

Considerable confusion has arisen in respect to the application of the so-called rule against hearsay by the failure to distinguish between statements the making of which is in dispute, and statements which relate to the facts in dispute. Anything which is in issue may be proved, whether it be a physical fact, or the making of a statement. In the latter case the testimony of a witness that such statement was made becomes original evidence of a fact in dispute. Evidence within the personal knowledge of the witness testifying is, of course, admissible. It is no exception to the hearsay rule, because it has nothing to do with it. Instances of this sort arise in cases for libel and slander, where the making of the libelous statement is denied. In such a case A. charges X. with the making of a certain statement. X. denies it. The making of the statement is the principal fact in issue. Evidence by any witness who heard the statement made is direct evidence to prove such fact. There is no question of hearsay involved.[4]

[4] In actions for libel, declarations may become material in a collateral way as evidence bearing on the question of malice. On this principle, declarations made to the person charged with publishing the libel, which would reasonably lead him to believe the publication was true, are admissible. Jones v. Townsend's Adm'x, 21 Fla. 431, 441, 58 Am. Rep. 676. The case of Connelly v. Brown, 73 N. H. 193, 60 Atl. 750, is an interesting illustration of the same principle. The action was for deceit on the part of the defendant in the sale of the furniture of a boarding house to the plaintiff; the deceit claimed being a representation by the defendant that the plaintiff could continue occupying the premises. The plaintiff introduced evidence tending to show that the defendant had received notice to quit from the landlord. Upon the question of the good faith upon the part of defendant in the assurances to plaintiff as to the continued occupancy of the premises, it was held that statements made by the landlord to defendant urging the defendant to remain in the premises were competent. In this case it will be readily seen that the making of the statements by the landlord was in itself an evidential fact bear-

SAME—STATEMENTS THE MAKING OF WHICH IS CIRCUMSTANTIAL EVIDENCE.

148. The fact of the making of a statement where it tends to prove a material fact in issue is admissible as circumstantial evidence.

Statements may be original circumstantial evidence of facts in issue, and are then admissible. They are admissible because the fact of their making throws light upon the question of the truth or falsity of the disputed facts; not because they state anything in regard to the existence or nonexistence of such facts, but because they in some way illustrate an attitude or state of mind or other evidentiary fact from which the main fact may be inferred.[5] It will thus be noted that declarations, in this sense, are not hearsay, except in a limited sense. It may be that the state of mind which the making of the statement tends to prove is declared in the statement itself. This is the case wherever the substance of the declaration is relied upon, rather than the manner of making it. The manner of making

ing upon the main fact in issue, and that it was, therefore, admissible for the purpose of establishing such main fact, to wit, that the condition with respect to continued occupancy of the premises was as the defendant had represented to the plaintiff.

[5] A. v. X. Action of assumpsit to recover for board and necessaries furnished to M., the wife of X. and daughter of A. A.'s evidence tended to show that X. had refused to provide for M., and that she had returned to his (A.'s) house. X. testified he had engaged board for M. and himself at the house of his mother, and offered to show statements made by M. evincing her satisfaction at such arrangement. It was held that the evidence was competent. Jacobs v. Whitcomb, 10 Cush. (Mass.) 255. In case of so-called "implied confessions," the evidence usually consists of testimony as to statements made in the presence of the accused, and his manner or attitude in respect thereto. This is another illustration of the introduction of statements for some circumstantial force which they have, and not to prove the truth of things stated. People v. Ah Yute, 53 Cal. 613. Declarations made by a third person to a witness, which have fixed in his recollection material facts to which he is testifying, are admitted on the same principle. State v. Fox, 25 N. J. Law, 566, 602; Hill v. North, 34 Vt. 604, 616; Barrow v. State, 80 Ga. 191, 194, 5

a statement, and the language used, may tend to show a certain intent or motive, or a state of anger, malice, approval, or satisfaction. In addition to this, the statement may itself declare a state or intention or condition of the mind, as where a person, in a fit of mental depression, expresses an intention to drown herself. If such intention be material as a fact in issue, the statement is admissible, to prove, both by the manner of its making and by its substance, that the intention existed. Yet the statement is not, in the strict sense, hearsay evidence.[6] It is the circumstances which surround the making,

S. E. 64. In Philadelphia & T. R. Co. v. Stimpson, 14 Pet. (U. S.) 448, 10 L. Ed. 535, it was held that statements made to third persons by a patentee, in which he described his invention and explained its parts, were admissible as a part of the res gestæ, to fix the date of the invention. Such declarations are scarcely within the rule as to res gestæ, but are clearly admissible upon the principle stated in the text. They are circumstantial evidence of a material fact in issue. Upon a question as to whether the defendant had procured certain property from the plaintiff's intestate by fraud, it has been held proper to permit a witness to testify to the statements made by the intestate that she intended to give her property to the plaintiff. As a piece of circumstantial evidence, the statement of an intention to give property to the plaintiff leads to the inference that the intestate did not voluntarily give the property to another person. Hagar v. Norton, 188 Mass. 47, 73 N. E. 1073. Where it is material to show that a person is conscious, statements made by such person in conversation at various times after an accident are admissible. Hayes v. Pitts-Kimball Co., 183 Mass. 262, 67 N. E. 249. There is danger of carrying the application of the principle upon which statements are admitted as circumstantial evidence too far, as was illustrated in Sheldon v. Bigelow, 118 Iowa, 586, 92 N. W. 701. In this case an attempt was made to hold A. as a partner in a firm of which his mother was a member, and as bearing upon the fact of A. being a partner a statement of the mother was admitted to the effect that her object in continuing the business was to aid her son in establishing himself therein. Such statement, if it had been a direct assertion that the son was a partner, would clearly have been inadmissible. As an indirect statement leading to such conclusion, is it not equally objectionable?

[6] In Com. v. Trefethen, 157 Mass. 180, 31 N. E. 961, 24 L. R. A. 235, will be found a full examination of the authorities, and a careful discussion of this particular class of evidence. It is there said (page 188, 157 Mass., and page 964, 31 N. E. [24 L. R. A. 235]): "Certainly to confine the evidence to acts, appearance, or speech which

and the manner in which it is made, which give it force as evidence. Where a condition of mind is involved, the court relies upon and admits as evidence what all men are accustomed to rely and act upon. The mind betrays its condition in manner and speech, and upon this must rest the conclusions of others with reference to it. It constitutes original evidence, and not hearsay.[7] A condition of bodily health is sometimes put on the same basis, and declarations allowed, as tending to throw light upon it.[8]

is wholly involuntary would be impracticable and unreasonable, for almost every expression of thought or feeling can be simulated; and although evidence of the conscious, voluntary declarations of a person as indications of his state of mind has in it some of the elements of hearsay, yet it closely resembles evidence of the natural expression of feeling which has always been regarded in the law not as hearsay, but as original, evidence." Where it was in question whether the deceased had met an accidental death, it was held that a declaration made by him when last seen alive that he was going on business to a place near where his body was found was admissible. Landon v. Preferred Acc. Insurance Co., 43 App. Div. 487, 60 N. Y. Supp. 188, affirmed 167 N. Y. 577, 60 N. E. 1114. Along the same line are Mathews v. Railway Co., 81 Minn. 363, 84 N. W. 101, 83 Am. St. Rep. 383; Mutual Life Ins. Co. v. Hillmon, 145 U. S. 285, 12 Sup. Ct. 909, 36 L. Ed. 706.

In Jones v. State, 44 Fla. 74, 32 South. 793, the question being one of assault, and evidence of prior threats by the accused having been introduced, a statement made by the accused, eight or ten days after the alleged assault, that he would kill the assaulted person, was admitted in evidence as showing a guilty intent.

[7] "Whenever the mental feelings of an individual are to be proved, the usual expressions of such feelings are original evidence, and often the only proof of them which can be had." Jacobs v. Whitcomb, 10 Cush. (Mass.) 255, 257. The fact that a testatrix died in the belief that her will was in existence has been held to be a fact provable by declarations made by her within three days of her death that the will was with the notary. The case being one of a lost will, such belief was material as tending to negative an intention to revoke. In re Steinke's Will, 95 Wis. 121, 70 N. W. 61. Such declarations would not have been admissible to prove the existence of the will. In re Valentine's Will, 93 Wis. 45, 67 N. W. 12. See 18 Harvard Law Rev. 387.

[8] In State v. Harris, 63 N. C. 1, 6, such evidence is described as falling under the head of natural evidence.

Where the statements relate directly to the condition of the person making them, as where they describe the physical or mental feelings, they are in one sense hearsay, and yet they cannot be strictly treated as such. It is the natural, and in fact the only reliable, way of ascertaining the physical condition of a person is to inquire of him and take his statements as to his own symptoms. Such statements may be said to have a double character. They are statements of a fact, and they are also facts in themselves; i. e., the making of them, under the circumcumstances surrounding their making, is a fact having distinct probative force.

Such statements might, therefore, be treated either under the head of this section or under the head of that exception to the hearsay rule embracing statements admitted because of circumstances giving them special reliability. In the latter aspect their value as evidence depends upon the circumstances under which they are made. In one case, where they were made for the purpose of enabling a physician to testify as to the physical condition of the witness, they were held to be inadmissible, on the theory that under the circumstances all incentive to truthfulness was gone, and instead self-interest became a motive for distortion, exaggeration, and falsehood.[9]

A familiar instance of the admission of declarations of this sort is found in a case where the testamentary capacity of a testator is in issue. His statements are admitted to illustrate his mental capacity.[10] Rational, intelligent statements in re-

[9] Consolidated Traction Co. v. Lambertson, 60 N. J. Law, 452, 38 Atl. 683; Hardin v. Railway Co. (Tex. Civ. App.) 88 S. W. 440; Bredlau v. York, 115 Wis. 554, 92 N. W. 261.

[10] It has been laid down that there are two conditions to the admissibility of declarations of this sort: "One is that the matters testified of should be sufficiently near in point of time so that the testimony may be of value in determining the question which is directly in issue. Another proper limitation is that the testimony should appear to have some natural bearing upon the mental condition of the person, or his intention, at the particular time which is immediately involved in the issue." Lane v. Moore, 151 Mass. 87, 90, 23 N. E. 828, 21 Am. St. Rep. 430. In this case the issue was as to the validity of a gift to the defendant by plaintiff's intestate. Mental weakness and incapacity was alleged. Declarations by the deceased three

gard to business and the affairs which occupy his mind lead to an inference of sanity, while the utterance of foolish, unintelligible statements tends to the opposite conclusion. The principle of the admissibility of statements of this kind has been extended to declarations of third persons to, or in the presence of, the person whose mental capacity is in issue, upon the theory that such declarations show a "cause for a state of mind existing subsequent to the communication."[11] It is to be remembered that in these cases the declarations are not admitted primarily to establish the facts asserted. The accuracy of the statement is not material. Here it is the fact of the making of a statement which throws some light upon the question at issue, and is therefore, under proper conditions, admitted. In many cases where the validity of a will is attacked, not only is the mental condition of the testator brought in issue, but acts of fraud, duress, or undue influence on the part of persons benefiting by the will. Declarations of the testator in such cases may be of such a nature as to bear as strongly on the latter facts as upon the mental condition of the testator. The fact that they do this is no ground for their exclusion, though the jury should be instructed that they must not be

months after the time of the alleged gift, in which he said, referring to the matter, "What do you think of that?" and that "it was a damnable thing; that he could put Moore [the defendant] through for it, and shut him up"—were held admissible as illustrating the condition of his mind. The following cases illustrate different applications of this same principle: Shaller v. Bumstead, 99 Mass. 112; Thorne v. Cosand, 160 Ind. 566, 67 N. E. 257; Sargent v. Burton, 74 Vt. 24, 52 Atl. 72; Waterman v. Whitney, 11 N. Y. 157; Herster v. Herster, 122 Pa. 239, 254, 16 Atl. 342, 9 Am. St. Rep. 95; Beaubien v. Cicotte, 12 Mich. 459, 486; Thompson v. Ish, 99 Mo. 160, 170, 12 S. W. 510, 17 Am. St. Rep. 552; Mooney v. Olsen, 22 Kan. 69, 77; Rambler v. Tryon, 7 Serg. & R. (Pa.) 90, 10 Am. Dec. 444. In Dennis v. Weekes, 51 Ga. 24, the declarations admitted as bearing on the mental capacity of a testator were: "I have done something I ought not to have done. I have made my will, and did not make it as I wanted to. I know I did wrong, but I could not help it. Lord God Almighty! whoever heard of such a will? But I can't change it." Declarations made from one to six years afterwards have been held too remote. Sanford v. Ellithorp, 95 N. Y. 48, 54.

[11] People v. Wood, 126 N. Y. 249, 262, 27 N. E. 362.

considered in that light. It is held, however, that they may be admitted for the purpose of showing the effect upon the mind of the testator of the external acts charged to have influenced him.[12] This is not going beyond the proof of a mental state or condition.

SAME—MARKET VALUE AND REPUTATION.

149. Where statements, oral or written, indicate a quality or characteristic, the existence of which is in issue, they are admissible as circumstantial evidence.

As illustrations of this, we have that feature of a salable article known as "market value." Market value is a thing which is capable of proof, yet it rests, as far as it can be testified to, upon statements, oral or written, made by persons dealing in such articles. A witness may testify directly that the market value of an article is a certain sum, but, if inquiry be made as to what his statement is based upon, it will almost invariably bring out the fact that some sale, offer, or oral or printed quotation, which he has heard or read, is relied upon. How far evidence of this sort may be introduced is a question of some uncertainty. It is not hearsay, in the strict sense. The facts that a sale took place, that an offer was made, and that the market quotation was such a figure, are distinct facts, upon which men familiar with such matters, and whose business it is to deal with them, are accustomed to rely. Accordingly the court is justified in admitting them for the in-

[12] Cudney v. Cudney, 68 N. Y. 148. In Shaller v. Bumstead, 99 Mass. 113, 126, Cote, J., says, referring to this class of declarations: "All this evidence, under whatever view it is admitted, is competent only and always to establish the influence and effect of the external acts upon the testator himself,—never to prove the actual fact or fraud or improper influence in another." On the same principle, declarations made by the testator, before the making of the will, as to an intention to dispose of the property in the manner in which the will disposes of it, are admissible to rebut the inference of the effect of external acts charged as fraudulent. Neel v. Potter, 40 Pa. 483, Gardner v. Frieze, 16 R. I. 640, 19 Atl. 113.

formation of the jury.[13] It is not every offer or sale, however, which will be competent. The element of publicity which gives importance to the transactions, as criterions of market value must be present. In general, it may be said that both sales and public offers to purchase or sell, in places where the commodities are ordinarily dealt in, may be proved as evidence of market value.[14] Mere private offers, on the other

[13] "That dealers are themselves guided in their transactions by such indications of the state of the market makes the fact one that may properly be considered in evidence." Wells, J., in Whitney v. Thacher, 117 Mass. 523, 527. The admission of newspaper quotations is not universally conceded. The case of Cliquot's Champagne, 3 Wall. (U. S.) 114, 18 L. Ed. 116, generally cited as an authority for the admissibility of such evidence, does not go to this extent. All that was there admitted were price lists which were testified to be lists which had been handed to the witness by dealers of whom he had inquired the price of the wines contained on the list. The lists were no more than the statements of the dealers, and, the court having ruled that the price at which the dealers sold the wine was competent evidence, the prices named by them, on inquiry made, were, of course, admissible. In Whelan v. Lynch, 60 N. Y. 469, 473, 19 Am. Rep. 202, the court refused to admit quotations on the price of wool contained in a newspaper, saying: "It is not plain how a newspaper containing the price current of merchandise, of itself, and aside from any explanation as to the authority from which it was obtained, can be made legitimate evidence of the fact stated. Mere quotations from other newspapers, or informations obtained from those who have not the means of procuring it, would be entitled to little, if any, weight. The credit to be given to such testimony must be governed by extrinsic evidence, and cannot be determined by the newspaper itself without some proof of knowledge of the mode in which the list was made out. As there was no such testimony, the evidence was entirely incompetent, and should not have been received." To the same effect is Norfolk & W. Ry. Co. v. Reeves, 97 Va. 284, 33 S. E. 606.

[14] Whitney v. Thacher, 117 Mass. 523; Sisson v. Railroad Co., 14 Mich. 489, 497, 90 Am. Dec. 252; Latham v. Shipley, 86 Iowa, 543, 548, 53 N. W. 342. According to the definition of "market value" approved by the United States supreme court, sales and offers for sale are the very elements making up market value. The definition is as follows: "The price at which the owner of the goods, or the producer, holds them for sale; the price at which they are fully offered in the market to all the world; such prices as dealers in the goods are willing to receive, and purchasers are made to pay, when the goods are bought and sold in the ordinary course of trade." Cliquot's Champagne, 3 Wall. (U. S.) 114, 125, 18 L. Ed. 116; Muser v. Magone, 155 U. S. 240, 249, 15 Sup. Ct. 77, 39 L. Ed. 135.

hand, are inadmissible.[15] The distinction between this class of evidence and hearsay will be seen by assuming that the witness testifying has not himself heard the offer, but that it has been reported to him that such offer was made. Here we would have a case of hearsay, and he would not be permitted to prove the fact, namely, that a certain offer was made, by testimony that X. told him such was the case.[16] There is a distinction to be noted between matter which is brought out by way of qualifying a witness as competent to speak upon the question of market value, and testimony of matters given by a witness as evidence in itself of value. It is not essential that matters which an expert considers in forming his opinion should all be admissible as independent evidence. A dealer in a certain class of merchandise may derive much of his knowledge from hearsay, and yet be competent to testify to value.[17]

With respect to real estate, the prevailing rule is that offers of purchase or sale and particular sales themselves are inadmissible, on the theory that there is no established market for real estate, but each particular piece is dependent, for its value, upon many individual conditions.[18]

[15] Jones v. Jones, 120 N. Y. 589, 603, 24 N. E. 1016; Wood v. Insurance Co., 126 Mass. 316. In Norton v. Willis, 73 Me. 580, the court say (page 582): "There is too much contingency and uncertainty about offers to buy and sell, to give them importance as tests of value, and such evidence may be easily fabricated. But even to this rule there may be exceptions, where the offers are for property exposed for sale in open market in public places."

[16] Kirby Lumber Co. v. C. R. Cummings Co. (Tex. Civ. App.) 87 S. W. 231. It was held in this case that a witness could not testify as to sales made in Europe; his only source of information being telegrams and letters received from his own representative in Europe. The same court, however, held that testimony based on knowledge obtained by the witness from market reports was admissible. Texas & P. R. Co. v. W. Scott & Co. (Tex. Civ. App.) 86 S. W. 1065.

[17] Laurent v. Vaughn, 30 Vt. 90, 95; Betts v. Fruit Exchange, 144 Cal. 402, 77 Pac. 998; McCrary v. Railway Co., 109 Mo. App. 567, 83 S. W. 82.

[18] There is ordinarily no such market for real estate as to render offers of purchase or sale admissible on the question of value. Sharp v. United States, 191 U. S. 341, 24 Sup. Ct. 114, 48 L. Ed. 211; Loloff v. Sterling, 31 Colo. 102, 71 Pac. 1113; Watson v. Railway Co., 57

Reputation.

So, also, reputation rests upon what has been thought and said in the community generally concerning the person or fact in question. It thus has its basis in hearsay. This is no objection, however, to its admission.[19] Reputation is a fact which may be testified to, and a distinction must be made between it and the statements and declarations which go to make up the sentiment of a community, and which determine the nature of such reputation. A witness would not be permitted to state what he had heard A. or B. say in regard to the reputation of X. The form which his testimony must take is, "The reputation of X. is" so and so, though in his own mind his statement may rest upon what he has heard A. and B. say.[20]

Wis. 332, 351, 15 N. W. 468; Sherlock v. Railroad Co., 130 Ill. 403, 22 N. E. 844. On the same principle it was held in Seefeld v. Railroad Co., 67 Wis. 96, 29 N. W. 904, that deeds containing recitals of consideration, and relating to property in the same neighborhood, were inadmissible upon the question of value, being mere hearsay. It would not follow, however, that direct evidence of the fact of the sales by a witness knowing about them would be inadmissible. If the sales were fair sales, under proper conditions they might, upon the principle stated in the text, be admissible.

[19] An accurate statement of the true rule in regard to this class of evidence is found in Walker v. Moors, 122 Mass. 501, 504. See, also, Bank of Middlebury v. Town of Rutland, 33 Vt. 414, 430; Adams v. State, 25 Ohio St. 584; Hodges v. Coleman, 76 Ala. 103, 114. Drumm-Flato Commission Co. v. Gerlack Bank, 107 Mo. App. 426, 81 S. W. 503. Pecuniary condition is one of the matters as to which general reputation has been held admissible. Smith v. Compton, 67 N. J. Law, 548, 52 A. 386, 15 L. R. A. 480. Competency of a fellow servant. Giordano v. Granite Co., 3 Pennewill (Del.) 423, 52 A. 332. Reputation, in certain cases, will be excluded as hearsay. See Handy v. State, 63 Miss. 207, 56 Am. Rep. 803; Ramsey v. Smith, 138 Ala. 333, 35 South. 325. Ownership of personal property cannot be so proved. Louisville & N. T. Co. v. Jacobs, 109 Tenn. 727, 72 S. W. 954, 61 L. R. A. 188.

[20] Com. v. Rogers, 136 Mass. 158. In Powell v. Governor, 9 Ala. 36, it was held that a witness called to prove the value of lands could not be asked "what was the estimated cash value put on the lands levied, by the neighbors generally?"

REAL EXCEPTIONS TO GENERAL RULE AGAINST HEARSAY—STATEMENTS ADMITTED BECAUSE OF THE DIFFICULTY OF OTHER PROOF.

150. In certain cases the introduction of original evidence is rendered extremely difficult on account of the nature of the fact to be proved. In such cases, declarations as to the fact, made by persons who cannot be witnesses, are admitted. They are admitted because they are the best obtainable evidence.

By "difficulty of proof" is not meant that it would be expensive, or impose great hardship upon the party alleging the fact, to hunt up the witnesses and have them present at the trial, but that the nature of the fact itself, as, for instance, that it is an ancient fact, to which there are no living witnesses, prevents better proof from being obtained.

In the language of the court in a leading English case,[21] the principle which underlies all these exceptions is the same. "In the first place, the case must be one in which it is difficult to obtain other evidence; for no doubt the ground for admitting the exceptions was that very difficulty. In the next place, the declarant must be disinterested; * * * and, thirdly, the declaration must be made before dispute or litigation. * * * Lastly—and this appears to me one of the strongest reasons for admitting it—the declarant must have had peculiar means of knowledge, not possessed in ordinary cases."

Some of the more prominent instances of this class of exceptions are set forth in the succeeding pages.

SAME—DECLARATIONS OF TESTATOR AS TO CONTENTS OF WILL.

151. Where the question is about the contents of a will which has been lost, the declarations of the testator as to the contents of his will are admissible.

In cases of a lost or destroyed will, it frequently happens that there is no copy in existence, and no information possess-

[21] Sugden v. Lord St. Leonards, 1 Prob. Div. 154, 241.

ed by any person as to its contents, other than that derived from statements of the testator himself. To exclude testimony as to these statements would be to shut out the only available proof. The courts therefore hold that the declarations, though hearsay, are admissible.[22] So it is also in the case where a testator, having made two wills, the later of which contains a clause of revocation, which destroys the later one, and the question is as to whether there was an intention to revive the first. Proof of intention is at best a difficult matter, and, in the case of testamentary intention, well-nigh impossible to establish, except by evidence of the statements of the testator.[23] Declarations of a testator are also received for other purposes, such as to corroborate direct testimony as to a will alleged to be a forgery, or to have been executed under undue influence or force.[24]

There is a decided conflict between the cases upon the subject of the admission of a testator's declaration as evidence against the validity of a will. The weight of authority is said to be against such admission to show forgery. Upon the question of revocation, however, there is more tendency to make

[22] In Sugden v. Lord St. Leonards, 1 Prob. Div. 154, 225, 241, the question of the admissibility of declarations of a testator as to the will is fully discussed. See Mercer's Adm'r v. Mackin, 14 Bush (Ky.) 434, to the effect that such declarations are admissible, but are not alone sufficient proof to establish the will. The same principle of admissibility extends to declarations as to what sheets of writing made up the will. Gould v. Lakes, 6 Prob. Div. 1. It is sometimes provided by statute that a lost or destroyed will must be proved by at least two credible witnesses. In such a case it has been held that two persons who have both heard declarations of the testator as to the contents of the will, while they may testify as to such declarations, do not constitute two witnesses, within the meaning of the statute. Hatch v. Sigman, 1 Dem. Sur. (N. Y.) 519.

[23] Pickens v. Davis, 134 Mass. 252, 257, 45 Am. Rep. 322; In re Johnson's Will, 40 Conn. 587, 588.

[24] Taylor Will Case, 10 Abb. Prac. N. S. (N. Y.) 300, 306; Hoppe v. Byers, 60 Md. 381; Milton v. Hunter, 76 Ky. 163; Waterman v. Whitney, 11 N. Y. 157, 62 Am. Dec. 71. In Ball v. Kane, 1 Pennewill (Del.) 90, 39 Atl. 778, a declaration by the testator, two days after making the will, that his wife and son had made it, was held admissible to show mental capacity. The evidence had so slight a bearing upon this point that it seems it might well have been excluded, and it certainly was inadmissible on any other grounds.

use of the declaration as bearing upon intent, which, in turn, may be of evidential value in respect to the question of revocation.[25]

SAME—DECLARATIONS CONCERNING ANCIENT OWNERSHIP.

152. Declarations showing acts of ownership, where such acts purport to have been exercised at least 30 years prior to the trial, are admissible.

The declarations under this head consist ordinarily of statements in deeds, leases, surveyors' notes, maps, and other written instruments. It is not essential that it be the original instruments which are offered in evidence. An authenticated copy, providing it was made more than 30 years prior to its being offered, is equally admissible with the original.[26] If the copy is a recent copy, however, it is not admissible.[27]

It is a preliminary condition to the admissibility of such instruments that they come from proper custody, so as to give ground for believing them to be authentic, but, if the custody is sufficiently shown to have been proper, they are admissible without any proof of their execution.[28]

[25] Throckmorton v. Holt, 180 U. S. 552, 21 Sup. Ct. 474, 45 L. Ed. 663. See note on this case in 15 Harvard Law Rev. 149.

[26] Bradley v. Lightcap, 201 Ill. 511, 66 N. E. 546; Cochran v. Linville Imp. Co., 127 N. C. 386, 37 S. E. 496.

[27] Hamilton v. Smith, 74 Conn. 374, 50 Atl. 884.

[28] As illustrative of the application of this exception, see Malcomson v. O'Dea, 10 H. L. Cas. 593, 614–616; Moore v. Cooley, 88 Hun, 66, 34 N. Y. Supp. 624; Havens v. Land Co., 47 N. J. Eq. 365, 374, 20 Atl. 497; Quinn v. Eagleston, 108 Ill. 248, 253; Goodwin v. Jack, 62 Me. 414; Thompson v. Brannon, 14 S. C. 542, 550; Harlan v. Howard, 79 Ky. 373; Williams v. Conger, 125 U. S. 397, 415, 8 Sup. Ct. 933, 31 L. Ed. 778. Some of the various forms of instruments which have been admitted are deeds, In re Butrick, 185 Mass. 107, 69 N. E. 1044; Kansas City v. Scarritt, 169 Mo. 471, 69 S. W. 283; old survey, Davis v. Clinton, 79 S. W. 259, 25 Ky. Law Rep. 2021; draft of a survey, Mineral R. & M. Co. v. Auten, 188 Pa. 568, 41 Atl. 327; entries in books, Hamershlag v. Duryea, 58 App. Div. 288, 68 N. Y. Supp. 1061; partly burned sheets of old record book of French grants, Smyth v. Banking Co., 93 Fed. 899, 35 C. C. A. 646; old letter and army pay roll, Bell v. Brewster, 44 Ohio St. 690, 10 N. E. 679; plans

The proof of some act showing the exercise of a right under the document or referable to it is sometimes spoken of as a requisite to the admissibility of this class of evidence;[29] but it is not strictly a condition affecting its admissibility.[30] The failure to prove such act when it might naturally be expected may lessen the weight of the document, and the proof of some such act may greatly strengthen it; but its antiquity and production from a proper source are sufficient to open the door for its introduction as evidence under an exception to the hearsay rule.[31]

What is proper custody is a question for the court to determine from the facts of each particular case. In general, it may be said that if the document is in the possession of some person who, by reason of his connection with the subject-matter in question, might naturally have possession of it, it is sufficient.[32]

The exception which permits the instruments to be received in evidence by reason of their antiquity does not go further than to establish their authenticity prima facie. It is always allowable to give evidence to show that they are not genuine.[33]

The fact that the instrument offered is an ancient one does not affect its admissibility, except from the point of authenticity. Antiquity is no substitute for relevancy, and, if the document is objectionable as immaterial, or irrelevant, or incompetent, it will not be received merely because it is an

and field notes of surveyor, Whitman v. Shaw, 166 Mass. 451, 44 N. E. 333.

[29] Wilson v. Simpson, 80 Tex. 279, 283, 16 S. W. 40.

[30] Hodge v. Palms, 117 Fed. 396, 54 C. C. A. 570.

[31] Malcomson v. O'Dea, 10 H. L. Cas. 614.

[32] See cases cited in Pickens v. Davis, 134 Mass. 252, 45 Am. Rep. 322. As an illustration of what is considered proper custody, the following case serves: Upon a question of title the defendants relied upon certain land certificates, which were found among the papers of the deceased county surveyor and were produced by the surveyor's son; it being shown that the certificates had been sent by one A., the father of the person named in the certificates as the owner, to the surveyor for purpose of record. It was held that the certificates were sufficiently shown to have come from the proper custody. Ward v. Cameron (Tex. Civ. App.) 76 S. W. 240.

[33] Albright v. Jones, 106 Ga. 302, 31 S. E. 761.

ancient document.[34] The nature of a deed or lease as evidence is not wholly confined to its hearsay quality. If A. makes a lease to B., it has the effect, even if it does not expressly so state, of a statement that A. has title as owner, and B. as tenant. So far as it is admitted in evidence for the force of this statement, it is hearsay. But that is not the only effect it has. The fact that the lease is made by A., which appears at once upon the lease being conceded to be authentic, has a circumstantial force. Men do not ordinarily make leases for amusement, nor unless they have the right to lease that to which the lease relates. The making of a lease or deed is an operative act, and is circumstantial evidence of that to which the act relates.

SAME—MATTERS OF PEDIGREE.

153. Declarations relating to pedigree are allowed where they were made, before the commencement of the suit, by a deceased person, provided the person making them was related by blood to the person to whom they refer, or was the husband or wife of such person.

Much of our knowledge respecting facts of pedigree and relationship is based upon the statements and declarations of members of the family. It being a subject of family concern and interest, and there being seldom any motive for misstatement, declarations of this sort possess a reliability beyond that possessed by ordinary statements. Where the question of pedigree is one of some years back, it is generally the case that there is no living witness who has personal knowledge of the facts, and it therefore becomes necessary, if any proof at all is to be had, to resort to what may be said to be the reputation in the family concerning the facts; that is, what has been handed down from father to son,[35] or to other form

[34] King v. Watkins (C. C.) 98 Fed. 913.

[35] In Davies v. Lowndes, 6 Man. & G. 471, Lord Denman discusses the question of the admission of a genealogy which had been indorsed by a deceased member of the family as a correct account of the family origin. The document was offered to show who the grandfather of one X. was; who the father of X. was; who the paternal uncles and

of hearsay evidence.[36] The rule is very strict as to the degree of relationship which must exist in order to render the decla-

first cousins of X. were; that X.'s uncle John died a bachelor; that X.'s uncle George had certain children then living; that a certain marriage had taken place. It was held that it was admissible on all these questions, which were questions of pedigree. Lord Denman says: "But the reason why a pedigree, when made or recognized by a member of a family, is admissible, may be that it is presumably made or recognized by him in consequence of his personal knowledge of the individuals therein stated to be relations, or of information received by him from some deceased member of what the latter knew or heard from other members who lived before his time." See Shrewsbury Peerage Case, 7 H. L. Cas. 1, 33, where a pedigree not signed by any member of the family was rejected. Hubbard v. Lees, L. R. 1 Exch. 255. Eastman v. Martin, 19 N. H. 152, acc. In Doe v. Griffin, 15 East, 293, to prove that X. died without issue, Lord Ellenborough allowed evidence from a member of the family that X. had, when a young man, gone abroad, and had, according to the repute of the family, died in the West Indies, "and that she had never heard, in the family, of his having been married." In Inhabitants of North Brookfield v. Inhabitants of Warren, 16 Gray (Mass.) 171, a framed chart, hanging on the wall, and kept in the family for a long time, containing a record of births, deaths, marriages, and their dates, was admitted; also, an inscription on a tombstone. In Jackson v. Boneham, 15 Johns. (N. Y.) 226, the question was as to the relationship of the plaintiff, who claimed certain lands, to one Moses Minner or Minor, a soldier, named in letters patent of the lands. A sister of the plaintiff was called, and testified, under objection, that the general opinion in the family was that Moses Miner, a brother of hers, was a soldier in the New York troops, and had been killed. It was held that this was admissible for the purpose of showing his death, and the place where he died. Evidence that a child was treated by a negro couple as their child was held to be admissible on the question of whether he was a negro. Locklayer v. Locklayer, 139 Ala. 354, 35 South. 1008. See, also, as illustrative of the general principle under discussion, Northrop v. Hale, 76 Me. 306, 49 Am. Rep. 615; Copes v. Pearce, 7 Gill (Md.) 247, 262; Sitler v. Gehr, 105 Pa. 577, 51 Am. Rep. 207; Metheny v. Bohn, 160 Ill. 263, 266, 43 N. E. 380; Doe v. Witherspoon, 32 N. C. 185; De Haven v. De Haven, 77 Ind. 236; Dawson v. Mayall, 45 Minn. 408, 411, 48 N. W. 12; Kelly's Heirs v. McGuire, 15 Ark. 555, 604. In Fulkerson v. Holmes, 117 U. S. 389, 397, 6 Sup. Ct. 780, 784, 29 L. Ed. 915, Justice Woods states the rule as follows: "The rule is that declarations of deceased persons who were de jure

[36] Davies v. Lowndes, 6 Man. & G. 471; Inhabitants of North Brookfield v. Inhabitants of Warren, 16 Gray (Mass.) 171; Travelers' Ins. Co. v. Cotton Mills, 85 S. W. 1090, 27 Ky. Law Rep. 653.

ration admissible.[37] Formerly it was thought that it should be confined to those connected by blood only with the family to which the pedigree related, but subsequently it became established that declarations of a husband or wife would be admitted.[38] Neither a wife's sister,[39] nor an old family servant,[40] are included in the rule, though, if the rule were elastic, and thus adapted to the particular cases where the facts showed the necessity of its application, many cases of old servants or collateral relatives would come within its principle. It has been argued that the principle of necessity upon which this exception to the hearsay rule rests is applicable to declarations of others than members of the family; e. g., to the records of a lodge of which the deceased was a member. The courts

related by blood or marriage to the family in question may be given in evidence in matters of pedigree. * * * A qualification of that rule is that before a declaration can be admitted in evidence the relationship of the declarant with the family must be established by some proof independent of the declaration itself. * * * But it is evident that but slight proof of the relationship will be required, since the relationship of the declarant with the family might be as difficult to prove as the very fact in controversy."

[37] Connecticut Mut. Life Ins. Co. v. Schwenk, 94 U. S. 593, 24 L. Ed. 294; Eastman v. Martin, 19 N. H. 152; Carnes v. Crandall, 10 Iowa, 377. In Stein v. Bowman, 13 Pet. (U. S.) 209, 220, 10 L. Ed. 129, testimony of a witness that "he had been in Hanover, Germany, last summer, and there heard from many old persons of whom he inquired that the plaintiff was the brother of Nicholas Stone, deceased," was excluded on the ground that the declarations were not of "members of the family who may be supposed to have known the relationships which existed in its different branches." See, to the same effect, Chapman v. Chapman, 2 Conn. 347, 7 Am. Dec. 277.

[38] The Shrewsbury Peerage Case, 7 H. L. Cas. 1, 26, established the principle that the declarations of a wife as to her husband's family were admissible. In Jewell's Lessee v. Jewell, 1 How. (U. S.) 219, 231, 11 L. Ed. 108, the same principle is applied to the declarations of a deceased husband. But see Harland v. Eastman, 107 Ill. 535, for some qualifications of the rule as applied to husbands.

[39] In Blackburn v. Crawfords, 3 Wall. (U. S.) 175, 187, 18 L. Ed. 186, the question was whether A. was ever legally married to X. It was held that the declaration of B., a deceased sister of A., as to the marriage, was inadmissible.

[40] Johnson v. Lawson, 2 Bing. 86; Arnold v. Auldjo, 5 U. C. Q. B. 171.

have, however, very generally confined the exceptions within the narrow limits laid down.[41]

In the application of the rule admitting declarations as to pedigree, the first thing to be determined is whether the question is one of pedigree. To constitute a question of pedigree, there must be involved a matter of parentage or relationship.[42] Age, place of birth, time of birth, time and place of death, are not in themselves questions of pedigree.[43] They may, however, be connected with questions of pedigree in such a way as to render declarations concerning them admissible. Place of birth may be a material circumstance from which an inference may be drawn as to whether A. was or was not a son of B. Time of birth might also throw light on that question. In such case, declarations would be admitted to show these facts.[44] Even in cases where no question of pedigree

[41] Connecticut Mut. Life Ins. Co. v. Schwenk, 94 U. S. 593, 598, 24 L. Ed. 294.

[42] In Eisenlord v. Clum, 126 N. Y. 552, 563, 27 N. E. 1024, 12 L. R. A. 836, pedigree is defined as including "descent and relationship," and again (page 564, 126 N. Y., and page 1027, 27 N. E. [12 L. R. A. 836]), it is said: "Upon questions of pedigree (i. e., in a controversy merely genealogical), hearsay evidence is allowed as to the time of birth of a certain party, as to a marriage, death, legitimacy or the reverse, consanguinity generally, and particular degrees thereof and of affinity."

[43] Town of Londonderry v. Town of Andover, 28 Vt. 416, 427, was a case where it was sought to bring place of birth under the rule as to pedigree. It was held that it was not a question of pedigree. So, also, Adams v. Inhabitants of Swansea, 116 Mass. 591. These cases are where it was an independent question. Where the question arose as to whether the age of a person had been correctly stated in an application for life insurance, the question was held not to be a question of pedigree. Connecticut Mut. Life Ins. Co. v. Schwenk, 94 U. S. 593, 24 L. Ed. 294. In the case of Kennedy v. Doyle, 10 Allen (Mass.) 161, the question of defendant's age was involved, under a plea of infancy, and a baptismal record was allowed to be put in evidence; but this was not because the question was treated as one of pedigree, but because the entry was held admissible on the ground that it was made in the regular course of business, and in performance of a duty, by a person since deceased.

[44] Mason v. Fuller, 45 Vt. 29; Van Sickle v. Gibson, 40 Mich. 170; Wise v. Wynn, 59 Miss. 588, 42 Am. Rep. 381. See opinion of Vice Chancellor in Shields v. Boucher, 1 De Gex & S. 40—an elaborate discussion of this phase of the question.

is involved, it has been held, in analogy to the pedigree cases (or under the erroneous assumption that a question of pedigree was raised), that declarations and sometimes family reputation as to facts of this nature were admissible.[45]

154. KINDS OF DECLARATIONS ADMISSIBLE—The declarations embraced within this exception to the hearsay rule include both specific, oral and written declarations, and also general declarations which crystallize into what is known as family reputation or tradition.

A member of a family who testifies to statements made by his father or grandfather with respect to a matter of pedigree, and one who testifies what the tradition of the family is in respect to the same matter, without being able to refer to any specific declaration, are both equally testifying to hearsay. In matters of pedigree, however, both classes of hearsay are allowed. With respect to the first, there is no distinction made between oral and written declarations.

For example, a recital of a fact in a deed executed by a member of the family is admissible. In such a case as this it will be seen that the same instrument may involve the application of both the ancient document and the pedigree exceptions to the hearsay rule; the document going in without proof because of its antiquity, and, when admitted, serving as evidence of pedigree by reason of recitals contained in it.[46]

[45] The case of Du Pont v. Davis, 30 Wis. 170, is an illustration of the extension of the principle to a case where no question of pedigree was involved. The action was ejectment. Defendant claimed that one X., a joint tenant with the plaintiff, should have been made a party plaintiff. The plaintiff was allowed to introduce evidence of reputation in the family of X. that X. was killed in an explosion, on the theory that the question of death was one of pedigree. As an amusing illustration of the extreme to which the courts will go in the application of a principle, the case of Jones v. Packet Co. (Miss.) 31 South. 201, is worth citing. Here the question was as to the pedigree of a jackass. In an action for negligently causing his death, it was held that his pedigree might be proved by testimony as to what it was reputed to be among those who were acquainted with him.

[46] Jackson v. Dunton, 26 Pa. Super. Ct. 203; Wilson v. Braden, 56 W. Va. 372, 49 S. E. 409, 107 Am. St. Rep. 927; Eisenlord v. Clum, 126 N. Y. 552, 565, 27 N. E. 1024, 12 L. R. A. 836.

The mere fact of antiquity is not sufficient to render statements as to pedigree, contained in a document, admissible. The statements, to be admissible, must themselves satisfy the requirements of the pedigree rule.[47]

With respect to the second, there are certain qualifications which may be noticed. The reputation allowed in evidence is family reputation, and not general reputation; and the testimony as to reputation must come from some one who knows; i. e., a member of the family.[48]

155. BY WHOM DECLARATIONS MUST BE MADE—A declaration, to be admissible, must have been made by a person, or the husband or wife of a person, related by blood to the family, with which the person, whose pedigree is in question, either is connected, or seeks to connect himself.

This is a more accurate statement of the rule in respect to the qualifications of the declarant than that contained in the general statement of the rule. It has already been said[49] that the rule is a strict one with reference to the degree of relationship required, and some cases have been cited in illustration of this.[50] The doctrine that declarations of a husband would be received was first laid down by Lord Erskine in 1806.[51] And the same rule was applied to declarations of a wife in 1857.[52] Beyond this it has never been extended. The

[47] Lanier, Hamilton & Co. v. Hebard, 123 Ga. 626, 51 S. E. 632.

[48] Lord Eldon, in Whitelock v. Baker, 13 Ves. 511, 514, says: "It was not the opinion of Lord Mansfield, or of any judge, that tradition, generally, is evidence, even of pedigree. The tradition must be from persons having such a connection with the party to whom it relates that it is natural and likely, from their domestic habits and connections, that they are speaking the truth, and could not be mistaken." When one testifies to reputation, he testifies to hearsay. To permit him to testify to another having told him that the reputation was so and so is, if the expression may be used, double hearsay. See Dupoyster v. Gagani, 84 Ky. 403, 409, 1 S. W. 652; Jackson v. Boneham, 15 Johns. (N. Y.) 226.

[49] Ante, p. 272.

[50] Ante, p. 273, note 37.

[51] Vowles v. Young, 13 Ves. 140.

[52] Shrewsbury Peerage Case, 7 H. L. Cas. 1, 26.

blood relationship usually thought of in connection with the rule is that between the declarant and the person whose pedigree is in question; yet this is not essential. For example, in one case [53] the question was whether A. could take property from X., as being the son of Y., X.'s brother. The declarations of Y. as to A. not being his son, but being the illegitimate son of Y.'s wife, are admissible. Here is a case where the declaration of Y. is admitted, though it is expressly denied that there is any blood relation between himself and the person whose pedigree is in question. The rule, therefore, may perhaps be modified by saying that it is sufficient if the declarant is related either to the family with which the person in question seeks to connect himself, or to the person whose pedigree is in question.[54]

This statement of the rule is, however, scarcely broad enough to cover a case recently decided where A., an administrator, sued a savings bank to recover moneys deposited by his intestate, and which, upon the passbooks, were specified as in trust for her two sons, whose names were given. A. claimed that his intestate never had any sons and that the names were fictitious. Witnesses were allowed to testify to declarations made by A.'s intestate to them to the effect that she had not and never had had any children.[55]

It will be seen that here there was no person whose pedigree was in question, and that there was, therefore, no foundation of relationship for the admission of the statement. Yet the principle upon which this exception is founded seems applicable to this case. While there was no person in question who was connected with, or who sought to connect himself with, the

[53] Craufurd v. Blackburn, 17 Md. 49, 77 Am. Dec. 323. The principle has also been extended to the case where the question related to the paternity and relationship of an illegitimate child, and declarations of a man and wife who had adopted the child and raised it were held to be admissible. Alston v. Alston, 114 Iowa, 29, 86 N. W. 55.

[54] The point as to the relationship necessary to render declarations as to pedigree admissible is discussed in a note in 20 Harvard Law Rev. 142.

[55] Washington v. Bank for Savings, 171 N. Y. 166, 63 N. E. 831, 89 Am. St. Rep. 800.

family, yet there was a question raised by the defendant as to whether any such person existed, and the declarations which negatived the existence of such person, made by the one with whom the relationship was in question, might well be received. Where the question came up as to the admission of the declaration of a sister of the mother of an illegitimate son, it was held not admissible.[56] Here we have an instance where the declarant is a blood relation of the person whose pedigree is in question, but not related to the family with which he seeks to connect himself. This, however, does not show that the declaration of a sister would not be admitted if a case of legitimacy were prima facie established. The exclusion was probably on the ground that the other evidence showed the son to be illegitimate, and that, an illegitimate person having no family, no question of pedigree could arise.[57] The basis for the distinction between proving pedigree by a member of the family, and by a stranger who knows of the family reputation, seemingly lies in the greater guaranty of truth which the family associations give.[58] In some cases a person who had lived in the family for a long time as a servant or friend might have equal facilities for knowing the facts of family history with a member of the family. The drawing of a strict line such as that mentioned in the statement of the rule in such a case might operate to shut out valuable evidence, and evidence as worthy of credit as any which might come from a member of the family. On the whole, however, better results

[56] Cranford v. Blackburn, 17 Md. 49, 77 Am. Dec. 323.

[57] The arbitrary nature of the rule is shown by this refusal to apply it in cases where the question of pedigree arises in respect to an illegitimate child. Doe v. Barton, 2 Moody & R. 28.

[58] Speaking of the rule in this aspect, Swift, C. J., says in Chapman v. Chapman, 2 Conn. 347, 349, 7 Am. Dec. 277, "The declaration must be from persons having such a connection with the party to whom it relates that it is natural and likely, from their domestic habits and connections, they are speaking the truth, and cannot be mistaken. Bull. N. P. p. 294. So hearsay is good evidence to prove who is my grandfather, when he married, what children he had, etc., of which it is not reasonable to presume I have better evidence. So to prove my father, mother, cousin, or other relation beyond the sea, dead, and the common reputation and belief of it in the family gives credit to such evidence."

are probably accomplished by the application of a strict rule than would be the case were the matter left with indefinite limitations.[59] The question of pedigree is not necessarily one of ancient matters,[60] though it is generally so treated, and the instances of the use of hearsay evidence in respect thereto commonly relate to ancient facts. This may be accounted for by the fact that, in matters of recent date, better evidence is at hand, and self-interest compels its introduction.

156. PROOF AS TO DECLARANT'S CONNECTION WITH FAMILY—The question of whether or not the person whose declaration is sought to be introduced is a member of the family, within the meaning of the rule, is a preliminary question of fact for the court.

157. Such family connection need be shown only by prima facie proof.

If a declaration as to pedigree be offered, the witness testifying to the declaration, or some other witness, must be able to testify also as to the fact of the deceased declarant's relationship to the family. This is preliminary to the receiving of the declaration.[61] The fact of relationship may be disputed, in which case cross-examination of the witness might properly be allowed as to this point. This question is one of fact for the court to determine, and it is largely in the discretion of the court as to just how far the preliminary inquiry will be permitted to be pursued. Usually the examination of the single witness who is offered to testify to the declara-

[59] In Alston v. Alston, 114 Iowa, 29, 86 N. W. 55, there was a departure from the prevailing doctrine, and declarations of foster parents who were in no wise related to the person whose pedigree was in question were held admissible.

[60] Judge Peckham says in Eisenlord v. Clum, 126 N. Y. 552, 563, 27 N. E. 1024, 12 L. R. A. 836: "The exception regarding the admission of hearsay evidence in case of pedigree is not confined to ancient facts, but extends also to matters of pedigree which have recently transpired, and the hearsay as to deceased witnesses is admitted as to facts which have occurred in the presence of living witnesses."

[61] Chapman v. Chapman, 2 Conn. 347, 349, 7 Am. Dec. 277.

tion suffices. The degree of proof required is not great. It is sufficient if a prima facie case as to relationship is made out.

158. EXTENT OF RULE—The rule as to proof of pedigree covers cases where the question is raised as an evidentiary fact as well as those where it is a main fact in issue.

It is the better opinion that a question of pedigree, whether it be one of the main facts in issue, or an evidentiary fact, may be proved in the same way.[62] Ordinarily there is no distinction between the method of proving a principal fact and one which is evidentiary merely, and there is no good reason why there should be in this case.[63]

159. ADMISSIBILITY AS AFFECTED BY TIME OF MAKING DECLARATIONS—A further condition of the admissibility of declarations of this nature is that they must have been made before the beginning of the controversy in which the question of pedigree arises.

A common form of expressing this condition is that the declarations must have been made ante litem motam. This does not mean, however, that it is sufficient if they have been made before the commencement of the actual suit. As a matter of fact, they must have been made before the existence of the

[62] See Steph. Dig. Ev. art. 31, for a different statement of this aspect of the rule. The case he cites does not support his statement. While there was a question of death involved, it was distinctly held that there was no question of pedigree either principally or collaterally involved. Whittuck v. Waters, 4 Car. & P. 375.

[63] In Inhabitants of North Brookfield v. Inhabitants of Warren, 16 Gray (Mass.) 171, it was distinctly held that the exception extends to cases where pedigree is collaterally involved. The language of the court is (page 175): "Some of the authorities seem to limit the competency of this species of proof to cases where the main subject of inquiry relates to pedigree, and when the incidents of birth, marriage, and death, and the times when these events happened, are directly put in issue. But, upon principle, we can see no reason for such a limitation. If this evidence is admissible to prove such facts at all, it is equally so in all cases, whenever they become legitimate subjects of judicial inquiry and investigation."

controversy which has given rise to the suit, in order to be admissible. This is a rule of fairness, and is a necessary precaution against unreliable and prejudiced statements made as the result of sympathy or passion, or other feeling, or with a view to their subsequent use in litigation.[64]

SAME—PROOF OF AGE OF PERSON.

160. The testimony of a person as to his own age, though founded on hearsay, has always been held admissible.

Analogous to the rule allowing hearsay upon questions of pedigree is the rule as to proof of age. The question of age may, from the nature of the case in which it arises, and with reference to the issue upon which it becomes material, become a question of pedigree, but ordinarily it is not a question of that kind.[65] Where it arises under a plea of infancy, or upon a prosecution for rape, it in no wise differs from any other fact. Yet it has always been held that a certain sort of hearsay, namely, the testimony of the person whose age is involved, is admissible.[66] In fact, the practice of allowing this testimony is very ancient, and dates back to a period before the development of the rule against hearsay. It may be said to be a practice which has survived in spite of the rule. The basis for the admission of this testimony is very much the same as in the case of questions of pedigree. There is usually a difficulty in bringing other proof, or, at all events, the testi-

[64] Stein v. Bowman, 13 Pet. 209 (U. S.) 220, 10 L. Ed. 129; People v. Fulton Fire Ins. Co., 25 Wend. (N. Y.) 205, 209; Northrop v. Hale, 76 Me. 306, 49 Am. Rep. 615; Barnum v. Barnum, 42 Md. 251, 304.

[65] In Houlton v. Manteuffel, 51 Minn. 185, 53 N. W. 541, the question was treated as a question of pedigree, though obviously not so.

[66] Com. v. Phillips, 162 Mass. 504, 39 N. E. 109; Houlton v. Manteuffel, 51 Minn. 185, 53 N. W. 541; State v. Cain, 9 W. Va. 559, 569. In the case of an orphan, where it appeared her knowledge of her own age was obtained from a person outside of her family, with whom she had lived, it was held that the evidence was not admissible. People v. Colbath, 141 Mich. 189, 104 N. W. 633. It is doubtful if this represents a sound view, as from practical considerations it is obvious that testimony of any person as to his own age is about as reliable as can be obtained.

mony of the person himself is the easy and natural proof. A person has a peculiar interest in his own age, and is likely to be posted upon the point. His opportunities for acquiring knowledge in this direction are also greater than those of other persons, with the exception of his parents and immediate relatives. His testimony, "based as it must be on family tradition, and fortified by his knowedge of himself,"[67] is apt to be exceptionally accurate. The cases go to the extent of allowing the testimony to reach to the exact day of birth, which, of course, is hearsay pure and simple.[68]

It is held that a witness may still give testimony of this sort, although it appears that all information he has on the subject is derived from a member of his family who is living and within the jurisdiction of the court.[69]

SAME—MATTERS OF A PUBLIC NATURE.

161. Declarations concerning matters of a public nature, whether contained in public documents or standard books, are admissible.

Before leaving the subject of those matters which may be proved by declarations because of the difficulty of other proof, reference should be made to the rule respecting ancient facts of a public nature.[70] There is really no rule of hearsay which would exclude declarations concerning such matters, provided they be confined strictly to public matters. Most if not all such matters come within the scope of the principle of judicial notice, and any source of information which the court considers reliable, whether direct testimony or hearsay, may be resorted to.[71] These matters are, however, usually treated as

[67] Holmes, J., in Com. v. Stevenson, 142 Mass. 466, 468, 8 N. E. 341.

[68] Id.

[69] McCollum v. State, 119 Ga. 808, 46 S. E. 413, 100 Am. St. Rep. 171.

[70] In Stayner v. Burgess of Diotwisch, 12 Mod. 86, it is said: "For general history, which relates to the whole kingdom, is proper to be given in evidence in a matter relating thereunto; and the nature of the thing requires it when it cannot otherwise be well proved." See, also, McKinnon v. Bliss, 21 N. Y. 206, 215.

[71] Peyroux v. Howard, 7 Pet. (U. S.) 324, 342, 8 L. Ed. 700. In

exceptions to the hearsay rule,[72] and it is possible that the scope of the exceptions is broader than could be explained upon the theory of judicial notice alone. This exception is sometimes spoken of as being confined to ancient matters of a public nature.[73] The authorities do not so restrict it.[74] They are, however, strict in admitting only books and documents of recognized public authority.[75]

SAME—STATEMENTS ADMITTED BECAUSE OF CIRCUMSTANCES GIVING THEM SPECIAL RELIABILITY.

162. There are certain matters which have less of the element of difficulty of proof connected with them as reasons for their admission than that of special reliability, and these form another class of exceptions to the hearsay rule.

That there is no definite rule which admits matters merely because they have some guaranty of reliability is quite true, and in dividing the exceptions to the hearsay rule into two

McKinnon v. Bliss, 21 N. Y. 206, it is held that such facts must be put before the jury by the proof being adduced, "not only in order that the jury may all be equally possessed of the evidence from which their conclusions are to be drawn, but that the facts upon which their conduct is based may be known."

[72] Steph. Dig. Ev. art. 32.

[73] Morris v. Lessee of Harmer's Heirs, 7 Pet. (U. S.) 554, 557, 8 L. Ed. 781.

[74] See cases cited in notes 65–71.

[75] For example, Appleton's Encyclopedia was refused. Whiton v. Insurance Co., 109 Mass. 24. It has also been held that an article in a newspaper published many years before was inadmissible to show a matter of historical interest. City of Hartford v. Maslen, 76 Conn. 599, 57 Atl. 740. It has been held, however, that general reputation as to a historical fact or matter of public and general interest may be introduced. Upon a question as to who the trustees of the city of Monterey were in 1859, evidence was allowed that certain persons were commonly reputed to be the trustees at that time. City of Monterey v. Jacks, 139 Cal. 542, 73 Pac. 436. See, also, Morris v. Edwards, 1 Ohio, 189, 209. In the case of real estate, where the ownership is one of long standing, it has been held that it may be proved by testimony as to the general reputation in the neighborhood. Rice v. Melott, 32 Tex. Civ. App. 426, 74 S. W. 935.

classes it is not intended to claim any hard and fast dividing line between them, nor the exclusive presence of the distinguishing feature in the exceptions falling within the respective classes. The division has been made merely as a matter of convenience, and for the reason that in the one class the one element predominates, while in the second class the other is most prominent.

SAME—DECLARATIONS MADE UNDER OATH.

163. There are two classes of declarations under oath which have been admitted:

(a) Statements of witnesses taken under oath in form prescribed by statute, for the purpose of use in the particular trial.

(b) Statements made under oath by persons in other actions or proceedings, or at other trials.

The administration of the oath is the guaranty in every case which the court has of the truthfulness of the statements made by the witnesses. If a person has been previously sworn, and has testified to facts which become material at a later time, under certain circumstances his previous sworn testimony is held admissible. Two classes of cases are mentioned above, but in regard to the first little need be said; for the practice as to the taking of depositions before trial, and the conditions under which they may be taken, are largely governed by statutory provisions. It is conceived, too, that they do not in any sense form an exception to the hearsay rule, or have any connection with it. After the action has been begun, any depositions allowed to be taken stand on the same footing as testimony taken at the trial It is virtually a beginning of the trial for the purpose of convenience. It is true that no jury is summoned, and the testimony of the witnesses is taken out of court; but they are taken for the particular purpose of the suit, and with a view to the issues arising therein. They are taken in contemplation of being read before the jury. They are admitted, not because they are declarations material to the issues and having the sanctity of an oath, but because they have been taken in the suit and as a part of the trial of the

issues. Because of the necessities of the situation, and under the provisions of the statutes, the condition of physical presence before the jury, incident to the examination of ordinary witnesses, is dispensed with.

The other class of declarations consists of statements made under oath by persons in other actions or proceedings, or at other trials. Such declarations are held to be admissible where they are material to the issues, and under certain conditions with respect to the impracticability of obtaining the personal presence of the witnesses who have made them. They are real exceptions to the hearsay rule.

164. CONDITIONS UNDER WHICH DECLARATIONS UNDER OATH ARE ADMISSIBLE—Declarations under oath are admissible:

(a) When the witness who made them is dead;

(b) Or is physically or mentally incapable of being present at the trial;

(c) Or is kept out of the way by the adverse party;

(d) Or, in civil cases, is out of the jurisdiction of the court or cannot be found.

QUALIFICATIONS—Provided the following conditions exist:

(a) The person against whom the evidence is to be given must have had the right and opportunity to cross-examine the witness when his examination was taken.

(b) The questions in issue must be the same as in the proceeding in which the testimony was taken.

(c) The proceeding, if civil, must be between the same parties or their representatives in interest; if criminal, must relate to the same crime and be against the same person.[76]

The above specification of the conditions under which evidence in a former proceeding is received shows that this exception to the hearsay rule is founded, not only upon the special reliability given by the fact of the declarations having been under oath, but also upon the impossibility or difficulty of procuring the direct testimony of the witness. The exception is, therefore, in some degree referable to the class of exceptions first

[76] Steph. Dig. Ev. (Chase's Ed.) art. 32, and notes; 1 Greenl. Ev. (15th Ed.) §§ 163–168; Ephraims v. Murdock, 7 Blackf. (Ind.) 10.

discussed in this chapter. The prominent feature, however, of this class of declarations is the sanctity of the oath, and this justifies its being placed in the second class.[77] The fact of the decease of the person whose declarations are sought to be proved in this and the following exceptions under this class has been so important a feature that these exceptions have sometimes been classed together as "Declarations of Deceased Persons," and spoken of as admissible on that ground.[78] As the fact of the decease of the declarant is not the ground of admissibility, but only (in some jurisdictions) a necessary condition, I have preferred to classify them separately, according to the nature of the circumstances giving them that special credibility which renders them admissible.

Reference to the rule above stated with respect to the admissibility of declarations under oath shows that, aside from the disabilities mentioned as necessary conditions to the use of the declarations, there are certain requirements which must be met before the testimony is available. Of these requirements, those with respect to the identity of parties and issues upon the trial where it is sought to use the testimony, with those upon the trial where it was originally given [i. e. (b) and (c)] are founded upon the first requirement named, to wit, that the party against whom the testimony is offered must have had the right and opportunity to cross-examine. The right of cross-examination is the prominent feature of our system of trials. It is universally conceded to every litigant, and regarded as an indispensable prerequisite to the validity of all testimony.[79] This is,

[77] Wright v. Tatham, 1 Adol. & E. 3, 20. In this case A. brought ejectment against X. X. claimed under a will, and offered the shorthand notes of the testimony of one of the attesting witnesses to the will, given at a previous trial where A. and X. were both parties; the witness having since died. It appeared that there was another attesting witness, who was alive and within the jurisdiction of the court, and who might have been called. It was contended that, under these circumstances, the testimony of the deceased witness could not be given. The court held, however, that there was no question of best evidence involved, and that the testimony of the deceased witness, being under oath, was equal in degree to the direct testimony of the living witness.

[78] Steph. Dig. Ev. (Chase's Ed.) arts. 25–31.

[79] Upon the question whether a woman had become the lawful

therefore, laid down as the first condition under which previous testimony will be allowed to be used: If the party against whom it is offered had the right of cross-examination, he cannot complain of the use of the testimony; for it is to be presumed that he protected himself fully, under that right, against false or prejudiced evidence. It may be that the witness was not cross-examined at all. In such case, if the right and opportunity existed, the failure to exercise it does not prevent the use of the testimony.[80] It is sufficient if the party could have cross-examined the witness if he had wished to. His reasons for failure to exercise his right are immaterial. It must appear, however, very plainly that the opportunity was actually possessed in cases where it was not exercised, and in cases where it was exercised it must be plain that it was exercised on behalf of the party against whom the testimony is offered.[81] Nor is it any objection to the admission of previous testimony that facts have arisen since which would have qualified the party against whom the testimony is offered to have cross-examined in better shape; nor that the testimony was open to objection, because of insufficient qualification of the witness, but was admitted because the objection was not made.[82]

wife of a decedent under the practices and ceremonials of the Mormon Church, it was held that the court could not consider evidence introduced before a committee of the United States Senate. In re Parks' Estate, 29 Utah 257, 81 Pac. 83. And where ex parte affidavits were filed upon a motion for a subpœna duces tecum, it was held they were not admissible, there having been no opportunity for cross-examination. Phœnix Nat. Bank v. Taylor, 67 S. W. 27, 23 Ky. Law Rep. 2307.

[80] Bradley v. Mirick, 91 N. Y. 293; Walbridge v. Knipper, 96 Pa. 48. In Walbridge v. Knipper, the court say, in reference to this subject: "The fact that his testimony before the arbitrators had not been reduced to writing would not have been a valid objection, nor the additional circumstance that the defendant was not present and did not hear him testify, provided he had an opportunity of being present and neglected to avail himself of it."

[81] Thus, in Jackson v. Crilly, 16 Colo. 103, 26 Pac. 331, it was held that a recital in the record of the previous proceedings to the effect that "the respective counsel in this case were present," where it was neither conceded nor proved "in whose behalf, in what capacity, nor for what purpose the respective counsel were present," was not sufficient to admit the testimony.

[82] Wallach v. Railway Co., 105 App. Div. 422, 94 N. Y. Supp. 574.

Referring generally to the conditions under which testimony of this character is admissible, there is a certain orderly method of procedure which must be observed. A certain foundation must be laid by preliminary proof before the testimony becomes available. This is so with respect to any or all of the elements which enter into the question of admissibility. It must appear satisfactorily to the court, by testimony or otherwise, that one or more of the disabilities exist, that there was sufficient opportunity of cross-examination, that the questions in issue were substantially the same, and that there is sufficient identity with respect to the parties. The person offering the testimony must make it evident that he is in good faith resorting to the previous testimony only because the witness is not at the time available.[83]

A mere statement of counsel is not sufficient.[84]

In one case, at least, a further condition has been laid down, to wit, that the previous court must have had jurisdiction.[85]

165. IDENTITY OF PARTIES—The courts enforce strictly the rule that the issues must be between the same parties on both trials, although there is some elasticity allowed with respect to the relative positions of the parties.

While, in a general way, it may be said that the parties must be the same upon the two trials,[86] it is not necessary that the

In this case the court declined to shut out expert testimony given on a previous trial, upon the objection that the witness was not qualified; such objection not having been made at the time the testimony was originally introduced.

[83] Heminway & Sons Silk Co. v. Porter, 94 Ill. App. 609; Wabash R. Co. v. Miller, 158 Ind. 174, 61 N. E. 1005; Welch v. Railroad Co., 182 Mass. 84, 64 N. E. 695; Siefert v. Siefert, 123 Mich. 467, 82 N. W. 511.

[84] Houston & T. C. Ry. Co. v. Smith (Tex. Civ. App.) 51 S. W. 506.

[85] Deering v. Schreyer, 88 App. App. 457, 85 N. Y. Supp. 275.

[86] The following illustration may be cited: A. was the owner of two pieces of land. He sold one to B. A. and B. were then both ousted of possession by X. Both brought actions of ejectment against X. Evidence was introduced in the action of A. v. X., and A. recovered a verdict. In the action of B. v. X., X. submitted to a similar verdict, saying he would not trouble the court to hear the evi-

suit be brought in precisely the same way, or that the parties plaintiff and defendant be literally identical. All that is required is that the issues be raised between the same parties, and that such parties be in the same position, with respect to the use of the witnesses' testimony and the effect it has on the issues, as they were on the former trial. It may happen that in the later trial the positions of the parties are changed, and that he who was plaintiff is defendant, or vice versa; or it may happen that the plaintiff or defendant was a joint party with others on the first trial, and on the second stands alone. Such variances as these, provided they do not affect the issues, are not sufficient to shut out the testimony of deceased witnesses.[87]

The rule extends to parties identified in interest with the parties on the former trial, either as privies in blood, in law, or estate.[88] An executor or administrator is thus identified as a privy in law.[89] A remainderman or reversioner is privy in estate,[90] though one who holds a parcel of the same property

dence again, as it would be the same. Subsequently B. was again ousted by X., and brought another action of ejectment. Upon the trial he offered the testimony of a witness, since deceased, who had testified on the trial between A. and X. The court held it inadmissible. Doe v. Earl of Derby, 1 Adol. & E. 783. See, also, for illustrations of the same principle, Melvin v. Whiting, 7 Pick. (Mass.) 79; Norris v. Monen, 3 Watts (Pa.) 465; Hughes v. Clark, 67 Ga. 19; Marshall v. Hancock, 80 Cal. 82, 22 Pac. 61.

[87] Wright v. Tatham, 1 Adol. & E. 3, 19; Wright v. Cumpsty, 41 Pa. 102; Clealand v. Huey, 18 Ala. 343. On the later trial, if there are new parties joined who were not parties on the former trial, the testimony cannot be used. While a reduction in the number of parties on the later trial does not affect the rule, an increase makes it inapplicable, Orr v. Hadley, 36 N. H. 575, 581; unless the new party added is privy with the original parties, Goodlett v. Kelly, 74 Ala. 213, 220; or unless the evidence is confined in its effect to the party alone who was a party on the previous trial, Stewart v. Bank, 43 Mich. 257, 5 N. W. 302.

[88] Jackson v. Lawson, 15 Johns. (N. Y.) 539.

[89] Osborn v. Bell, 5 Denio (N. Y.) 370, 377, 49 Am. Dec. 275; Indianapolis & St. L. R. Co. v. Stout, 53 Ind. 143, 158; Hutchings v. Corgan, 59 Ill. 70.

[90] Jackson v. Lawson, 15 Johns. (N. Y.) 539. But a person who, as the next friend of infants, brings a suit, is not so identified with the infants as to make testimony given in a previous action between herself, individually and in her own right, and the defendant, admis-

derived separately from the same original owner is not.[91] So a subsequent grantee is privy in estate.[92]

With respect to the witness himself, however, it is held that he must have been a person who would have been, if alive, a competent witness on the second trial. In other words, any objection to his competency may be taken that could be taken if he were alive and placed upon the stand.[93] But where the witness' competency depends upon his own statements as to his qualifications, as in the case of an expert, and the party on the former trial failed to object to the competency or to cross-examine, the fact that there is not sufficient qualification shown in the testimony of the witness will not make it inadmissible upon objection interposed when the testimony is offered on the second trial.[94]

Identity a Question for the Court.

The question of whether the issues between the parties is the same as on the former trial, as well as those relating to the identity of the parties and to the position of the adverse party with respect to his opportunity to cross-examine, are all preliminary questions, relating to the admissibility of the previous testimony, and are for the court to determine.[95]

sible in the subsequent suit. Walterhouse v. Walterhouse, 130 Mich. 89, 89 N. W. 585; Hooper v. Railway Co., 112 Ga. 96, 37 S. E. 165.

[91] Jackson v. Crissey, 8 Wend. (N. Y.) 251.

[92] Yale v. Comstock, 112 Mass. 267. In this case A. sued X. for raising the height of a dam and flowing A.'s land. A. derived title from M., and X. derived title from S. Upon the trial X. offered the testimony of S., given upon a former trial, in respect to the height of the dam. The former trial was between M. and S., and the question of the height of the dam was a material issue. S. had since died. Held admissible. See, also, Martin v. Ragsdale, 71 S. C. 67, 50 S. E. 671.

[93] Eaton v. Alger, 47 N. Y. 345, 350.

[94] Wallach v. Railway Co., 105 App. Div. 422, 94 N. Y. Supp. 574.

[95] Chase v. Mills Co., 75 Me. 156, 160; Perkins v. Stickney, 132 Mass. 217.

166. DISABILITIES WHICH ARE RECOGNIZED—The chief disabilities which the courts hold sufficient to justify the use of the testimony are death, sickness, collusive absence, and (in civil cases) absence beyond the jurisdiction of the court.

This is as the rule is generally accepted by the courts. Possibly it may be broader than it was in its inception, though at a comparatively early period it was approved in substantially this form,[96] and any positive disability which prevented the testimony of the witness being procured was deemed sufficient to justify the admission of his previous testimony. The tendency is rather to broaden the scope of the exception than to limit it, so far as its application to civil cases is concerned.[97]

[96] Fry v. Wood (1737) 1 Atk. 445. "Agreed, in this case, where a person has been examined in chancery, that in a cause at law between the same parties his deposition may be used in evidence, if it can be proved that the witness is dead, or by reason of sickness, etc., is not able to attend, or that he is out of the kingdom, or otherwise not amenable to the process of the court."

[97] Where death is the disability relied upon, proof that the witness is generally reputed to be dead and that such report of his death has been communicated to his family is sufficient to render his testimony admissible. Welch v. Railway Co., 182 Mass. 84, 64 N. E. 695. Insanity is sufficient. Whitaker v. Marsh, 62 N. H. 477. Absence from the state. Magill v. Kauffman, 4 Serg. & R. (Pa.) 317, 8 Am. Dec. 713. The absence must be for an indefinite time. Southern R. Co. v. Bronner, 141 Ala. 517, 37 South. 702. Absence from the jurisdiction has been held not to be sufficient, unless it be shown that due diligence has been exercised in trying to take the witness' testimony by commission, and that this is impossible by reason of his whereabouts being unknown. New York, L. E. & W. R. Co. v. Haring, 47 N. J. Law, 137, 139, 54 Am. Rep. 123; McGovern v. Smith, 75 Vt. 104, 53 Atl. 326. Absence of a public officer upon an official duty. Noble v. Martin, 7 Mart. N. S. (La.) 282. Absence by collusion with adverse party. Williams v. State, 19 Ga. 402; U. S. v. Reynolds, 1 Utah, 319. Temporary sickness, causing an inability to attend the trial, has been held sufficient, if, in the discretion of the trial judge, the ends of justice would be better accomplished by proceeding with the trial, and receiving the previous testimony, than by postponing it until the recovery of the witness. Chase v. Mills Co., 75 Me. 156; Molloy v. Express Co., 22 Pa. Super. Ct. 173. So, also, infirmity by reason of old age, which renders it difficult for the witness to attend personally. Thornton v. Britton, 144 Pa. 126, 22 Atl. 1048. A peculiar question has arisen where, under statutory provision, death of an adverse party renders the surviving party incom-

The mere fact of loss of memory by a witness called on the second trial does not justify the introduction of his testimony given on the first.[98] In this case, however, there would be no objection to the use of the previous testimony to refresh the witness' memory.[99]

Whether Disability Sufficient a Question for the Court.

In case of any disability except death, the party offering the testimony must, as a preliminary matter, show to the satisfaction of the court that he has used due diligence to obtain the personal attendance of the witness.[100]

As to Criminal Cases.

In criminal cases the disability is confined within narrower limits. The constitutional provisions for the protection of persons charged with crime, doubtless, are responsible for this. The provision is common which provides "that in all criminal prosecutions the accused has the right to meet the witness against him face to face," and while it is held that, where evi-

petent as a witness against the representative of the deceased party. In a case of this sort testimony given on a previous trial by the survivor in the lifetime of the deceased has been held admissible. Walbridge v. Knipper, 96 Pa. 48.

[98] Robinson v. Gilman, 43 N. H. 295; Reed v Orton, 105 Pa. 294, 299; Wells v. Drayton, 1 Nott & McC. (S. C.) 409. In this case one R. was examined on a previous trial of the case. He was summoned on the later trial as a witness, and said "that he had totally dismissed the subject from his mind; that he could at the first trial depend on his recollections, but not now; that he remembered now little or nothing of what passed between the parties concerning their contract, but that whatever he stated at the former trial was certainly true." It was held his previous testimony was not admissible. It seems that it might with propriety have been used to refresh the witness' memory. That under such circumstances the previous testimony will be allowed, see Rothrock v. Gallaher, 91 Pa. 108. But see State v. Waterworks Co., 107 La. 1, 31 South. 395, where a witness was unable to recall the facts to which he formerly testified by reason of the lapse of years and his advancing age. It was held that his testimony given on the former trial, upon his affirmation that his testimony was true, was admissible.

[99] Ruch v. Rock Island, 97 U. S. 693, 24 L. Ed. 1101; Stone v. Insurance Co., 71 Mich. 81, 38 N. W. 710.

[100] Dye v. Com., 3 Bush (Ky.) 3; Schearer v. Harber, 86 Ind. 536, 541; Wilder v. City of St. Paul, 12 Minn. 192, 206 (Gil. 116). But, see, McGovern v. Smith, 75 Vt. 104, 53 Atl. 326.

dence has once been given in court by the witness personally in the presence of the accused, it is not a violation of this provision to allow it to be repeated in case of the death of the witness,[101] still the influence of the provision is felt in the disinclination to extend the rule to many other disabilities which are recognized in civil cases.[102] Absence from the jurisdiction is held in some of the states to be sufficient, in criminal as well as in civil cases.[103]

167. MANNER OF PROOF OF DECLARATIONS—The manner of proof of previous testimony is not governed by any well-defined rule, accepted by all the cases. If the testimony has been written down by a stenographer or other person, such written statement forms the best basis of proof, upon being duly authenticated. If the testimony was not written down, the evidence of any one who heard it and remembers is sufficient.[104]

[101] Com. v. Richards, 18 Pick. (Mass.) 434, 29 Am. Dec. 608; Summons v. State, 5 Ohio St. 325, 342; Sage v. State, 127 Ind. 15, 25, 26 N. E. 667; State v. Able, 65 Mo. 357, 370; State v. Johnson, 12 Nev. 121. In Virginia the rule does not seem to have been extended to criminal cases, even in the case of a deceased witness. Finn v. Com., 5 Rand. (Va.) 701, 708; Brogy v. Com., 10 Grat. (Va.) 722, 732. The rule adopted in Virginia seems to prevail also in the United States courts and in the state of Texas. United States v. Sterland, Fed. Cas. No. 16,387; Cline v. State, 36 Tex. Cr. R. 320, 36 S. W. 1099, 37 S. W. 722, 61 Am. St. Rep. 850.

[102] Com. v. McKenna, 158 Mass. 207, 33 N. E. 389; Thornton v. Britton, 144 Pa. 126, 131, 22 Atl. 1048; State v. Staples, 47 N. H. 113, 119, 90 Am. Dec. 565.

[103] Com. v. Cleary, 148 Pa. 26, 38, 23 Atl. 1110; People v. Devine, 46 Cal. 45. Contra, Collins v. Com., 12 Bush (Ky.) 271; Brogy v. Com., 10 Grat. (Va.) 722, 732. Absence from jurisdiction by defendant's procurement was held not sufficient in Bergen v. People, 17 Ill. 426, 65 Am. Dec. 672.

[104] By stenographer's notes, Stewart v. Bank, 43 Mich. 257, 5 N. W. 302; by notes of counsel, Mineral Point R. Co. v. Keep, 22 Ill. 9, 19, 74 Am. Dec. 124; Rhine v. Robinson, 27 Pa. 30; Waters v. Waters, 35 Md. 531, 540; Carpenter v. Tucker, 98 N. C. 316, 3 S. E. 831; by judge's minutes of testimony, Martin v. Cope, 3 Abb. Dec. (N. Y.) 182, 192; by minutes of master in chancery, Yale v. Comstock, 112 Mass. 267; by a copy taken by another person of the judge's minutes, the copy being authenticated, and it appearing that the

In speaking of stenographers' or other minutes as forming a basis of proof, what is meant is that they may be used in connection with the stenographer's testimony.[105] The basis of their use, strictly speaking, is for the purpose of refreshing the memory of the witness who took them.[106] The notes themselves cannot be used as evidence.[107]

The fact that the testimony has been taken by a stenographer does not preclude the admission of oral evidence as to what the testimony was.[108] It has been held, however, in some cases, that the notes, when properly authenticated, are themselves admissible as evidence. In many of the decisions it may be a looseness of language which leads to this conclusion, though in some the point seems to have been expressly adjudicated.[109] But where the testimony has been incorporated into a case on appeal, which has, in accordance with statutory provisions, been filed, and has become a part of the record, it is held that

original minutes were lost, Whitcher v. Morey, 39 Vt. 459, 470. A stenographer's report of a dumb witness' testimony, where the same was given by signs, and transcribed by the stenographer in his own language, has been held admissible. Quinn v. Halbert, 57 Vt. 178. In the case of notes and minutes of this sort, it is held that their correctness may be disputed, and the question is for the jury as to the credit to be given them. Mineral Point R. Co. v. Keep, supra; Spalding v. Lowe, 56 Mich. 366, 370, 23 N. W. 46.

[105] Dady v. Condit, 104 Ill. App. 507. But it is now generally provided by statute that the stenographer's minutes may themselves be read in evidence upon the subsequent trial. The provision of the New York statutes (Code Civ. Proc. § 830) may be taken as a fair sample of the usual statutory provision upon this subject.

[106] Sloan v. Somers, 20 N. J. Law, 66; Waters v. Waters, 35 Md. 531, 540; Yancey v. Stone, 9 Rich. Eq. (S. C.) 429; Mineral Point R. Co. v. Keep, 22 Ill. 9, 19, 74 Am. Dec. 124; Phenix Ins. Co. v. Sullivan, 39 Kan. 449, 18 Pac. 528; Watrous v. Cunningham, 71 Cal. 30, 11 Pac. 811. In the case of a judge before whom the previous trial was had, there is no objection to the judge himself being a witness; and, if he becomes one, his minutes may be used to refresh his recollection, though he may, if he chooses, exercise his privilege and decline to testify. Welcome v. Batchelder, 23 Me. 85. See, also, Grimm v. Hamel, 2 Hilt. (N. Y.) 434.

[107] Huff v. Bennett, 4 Sandf. (N. Y.) 120, 129; Roston v. Morris, 25 N. J. Law, 173, 175; Livingston v. Cox, 8 Watts & S. (Pa.) 61.

[108] Meyer v. Foster, 147 Cal. 166, 81 Pac. 402.

[109] Brown v. Com., 73 Pa. 321, 13 Am. Rep. 740; Spalding v. Lowe, 56 Mich. 366, 370, 23 N. W. 46.

it is in itself competent as proof of what the testimony was.[110]

The rule extends also to facts which have been stipulated in evidence; that is, where the parties have stipulated that a witness, if called, would testify to certain facts, setting forth the facts in the stipulation. Upon a subsequent trial it has been held that the stipulation may be read in evidence.[111] Testimony of this character is not confined to persons connected with the case, but may be given by any person who heard the witness testify and who is himself a competent witness.[112]

168. PRECISE LANGUAGE NOT NECESSARY—It is generally held that, if the proving witness can state the substance of the entire testimony, he is competent.

It is not necessary that the precise language of the former testimony should be repeated. This follows, necessarily, from the rule which allows a person who heard the testimony to be a witness; for it would be practically impossible for such person to give the exact language. If the substance of the testi-

[110] Lathrop v. Adkisson, 87 Ga. 339, 13 S. E. 517; Slingerland v. Slingerland, 46 Minn. 100, 48 N. W. 605; Ross-Lewin v. Insurance Co., 20 Colo. App. 262, 78 Pac. 305. But see Edwards v. Gimbel, 202 Pa. 30, 51 Atl. 357, where it was held that testimony incorporated in a bill of acceptance could not be used as evidence on a subsequent trial. A deposition taken under a commission and duly filed would seem admissible on this same ground. Radclyffe v. Barton, 161 Mass. 328, 37 N. E. 373. A deposition taken to be used, but which was not in fact used, was held not admissible in George v. Fisk, 32 N. H. 32, 47. This seems too narrow a construction of the rule. All of the elements upon which the exception is founded are present here, as well as in the case of evidence orally given, or of a deposition actually read upon the trial.

[111] Fortunato v. City of New York, 74 App. Div. 441, 77 N. Y. Supp. 575. But it has been held that the rule does not allow it to be shown that on a former trial a witness, since deceased, offered to testify to certain facts. Lane v. DeBode, 29 Tex. Civ. App. 602, 69 S. W. 437.

[112] Costigan v. Lunt, 127 Mass. 354. Where the testimony was given through an interpreter at the former trial, it was held error to allow a witness to give in evidence the interpreter's statement of what was said; the witness himself not having understood the language interpreted. State v. Terline, 23 R. I. 530, 51 Atl. 204, 91 Am. St. Rep. 650. It has even been held that an official stenographer can-

mony is stated, it is sufficient.[118] This is the generally accepted rule. The doctrine generally prevails that a witness, to be competent to testify to evidence given upon a previous trial, must be able to state that he can give all the testimony, both

not give in evidence his report of the interpreter's translation. People v. Jan John, 137 Cal. 220, 69 Pac. 1063. In this case the interpreter himself was also present, a witness, and testified that he had accurately repeated the witness' statement; and, the stenographer having testified that he accurately transcribed them, it would seem that the notes might have been used, without too great violence to the hearsay rule.

[113] Ruch v. Rock Island, 97 U. S. 693, 24 L. Ed. 1101. In this case, Mr. Justice Swayne, delivering the opinion of the court, says (page 694, 97 U. S.): "The precise language of the deceased witnesses was not necessary to be proved. To hold otherwise would in most instances exclude this class of secondary evidence, and in so far defeat the ends of justice. Where a stenographer has not been employed, it can rarely happen that any one can testify to more than the substance of what was testified by the deceased, especially if the examination was protracted, embraced several topics, and was followed by a searching cross-examination. It has been well said that, if a witness in such case from mere memory professes to be able to give the exact language, it is a reason for doubting his good faith and veracity. Usually there is some one present who can give clearly the substance, and that is all the law demands. To require more would, in effect, abrogate the rule that lets in the reproduction of the testimony of a deceased witness. The uncertainty of human life renders the rule as we have here defined it not infrequently of great value in the administration of justice. The right to cross-examine the witness when he testified shuts out the danger of any serious evil, and those whose duty it is to weigh and apply the evidence will always have due regard to the circumstances under which it comes before them, and rarely overestimate its probative force." To the same effect, see Lime Rock Bank v. Hewett, 52 Me. 531; Young v. Dearborn, 22 N. H. 372; Earl v. Tupper, 45 Vt. 275, 283; Hepler v. Bank, 97 Pa. 420, 39 Am. Rep. 813; Wagers v. Dickey, 17 Ohio, 439, 49 Am. Dec. 467; Davis v. Kline, 96 Mo. 401, 9 S. W. 724, 2 L. R. A. 78; Solomon R. Co. v. Jones, 34 Kan. 443, 460, 8 Pac. 730; Clealand v. Huey, 18 Ala. 343; Puryear v. State, 63 Ga. 692; Horne v. Williams, 23 Ind. 37; Thompson v. Blackwell, 17 B. Mon. (Ky.) 609, 624; People v. Murphy, 45 Cal. 137, 143. It is held sufficient, in criminal cases as well as in civil, if the substance of the previous testimony be given. U. S. v. Macomb, 5 McLean (U. S.) 286, Fed. Cas. No. 15,702; Summons v. State, 5 Ohio St. 325, 346; State v. Able, 65 Mo. 357, 371; State v. O'Brien, 81 Iowa, 88, 90, 46 N. W. 752. In several of the states the stricter rule prevails, and the precise words are required. Yale v. Comstock, 112 Mass. 267. In Warren v. Nichols, 6 Metc. (Mass.) 261,

direct and cross-examination. The courts, as will be seen by the cases cited, vary in the strictness with which they hold to this doctrine. Some hold that remembrance of substantially all the facts as testified to sufficiently qualifies the witness,[114] while others insist upon a stricter interpretation.[115] When the word "substance" is used, it means substance of the whole testimony. One who heard only a part, or who remembers only a part, will not be permitted to testify, even though his memory be full and accurate with respect to that part.[116]

As will have been seen from an examination of the cases cited in the preceding notes, the cases differ very much in the manner in which they treat this subject. Some are very strict, and others allow much latitude in the introduction of this kind of testimony. As a practical matter, much depends upon the nature of each particular case and the subject-matter involved. It is easily conceivable that in certain cases the exact language

the rule was fully discussed, and the strict interpretation of it, mentioned above and adopted in the case of Com. v. Richards, 18 Pick. (Mass.) 434, 29 Am. Dec. 608, was adhered to, though the judges were not in accord as to its correctness in principle. See, also, Ephraims v. Murdock, 7 Blackf. (Ind.) 10; U. S. v. Wood, 3 Wash. C. C. (U. S.) 440, Fed. Cas. No. 16,756. In New York the rule is commonly stated as requiring the precise words, but it seems this does not mean without slight verbal difference. The language substantially as given is all that is required. Martin v. Cope, 3 Abb. Dec. (N. Y.) 182, 192; Clark v. Vorce, 15 Wend. (N. Y.) 193, 30 Am. Dec. 53; McIntyre v. Railroad Co., 37 N. Y. 287, 291.

[114] In Summons v. State, 5 Ohio St. 325, will be found a full and exhaustive discussion of the question. See, also, State v. O'Brien, 81 Iowa, 88, 91, 46 N. W. 752; Thompson v. Blackwell, 17 B. Mon. (Ky.) 609, 624.

[115] Woods v. Keyes, 14 Allen (Mass.) 236, 92 Am. Dec. 765; Emery v. Fowler, 39 Me. 326, 332, 63 Am. Dec. 627; Black v. Woodrow, 39 Md. 195, 220.

[116] Tibbetts v. Flanders, 18 N. H. 284, 292; Bule v. Carver, 73 N. C. 264; Fell v. Railroad Co., 43 Iowa, 177. But in Johnson v. Powers, 40 Vt. 611, an attorney for one of the parties, who had taken notes of the direct examination but not of the cross, was permitted to testify, on the theory that the other party, who was living and in court, had the opportunity to prove the cross-examination if he deemed it advantageous. See, also, Philadelphia & R. R. Co. v. Spearen, 47 Pa. 300, 86 Am. Dec. 544. In Black v. Woodrow, supra, one of the parties to the action was sworn as a witness to testify to what a deceased witness said on a former trial. He stated that he could state substantially what the deceased witness said with respect to the

would be necessary, while in others all the ends of justice would be served by admitting the substance.

169. SAME—EXTENSION OF RULE—In some jurisdictions the admission of declarations of this sort is extended to those made in preliminary investigations, arbitrations, and other like proceedings, where there has been a right of cross-examination.

There is a tendency in some states to give a very liberal interpretation to the rule, so far as the nature of the previous proceedings go. Ordinarily the testimony wished to be proven has been given upon the trial of an action, but it sometimes happens that it was given in a preliminary proceeding or investigation, in which witnesses have been examined, or in an arbitration between the parties.[117] The cases which go fur-

quality and condition of a lot of lumber, but could not state substantially what he testified as to the quality of pine grown on certain lands, concerning which the deceased witness had also given evidence. It was held that he was not sufficiently qualified.

[117] Preliminary hearing in criminal case before magistrate or justice of the peace. Com. v. Richards, 18 Pick. (Mass.) 434, 29 Am. Dec. 608; State v. Hooker, 17 Vt. 658; Floyd v. State, 82 Ala. 16, 22, 2 South. 683; Kendrick v. State, 10 Humph. (Tenn.) 479. But where the accused was not present, and had no opportunity to cross-examine, it was held that testimony given on a coroner's inquest could not be used against him on his trial. State v. Campbell, 1 Rich. Law (S. C.) 124. In Bailey v. Woods, 17 N. H. 365, which was a case where the previous proceeding had been an arbitration, the court says (page 372): "We do not understand that the admissibility of such evidence depends so much upon the particular character of the tribunal as upon other matters. If the testimony be given under oath in a judicial proceeding, in which the adverse litigant was a party, and where he had the power to cross-examine, and was legally called upon to do so, the great and ordinary tests of truth being no longer wanting, the testimony so given is admitted in any subsequent suit between the parties. An arbitration is a judicial proceeding, and the principle of the rule seems to apply as well to cases of this character as to technical suits at law." It seems likely that the arbitration referred to was one which was had under authority of some statute which gave the right to administer the oath. In an old New Jersey case, where the arbitration was an informal one, and the witnesses were not sworn, the testimony was not allowed in a subsequent trial. Jessup v. Cook, 6 N. J. Law, 434, 438. As to testimony taken before a

thest in extending the rule never depart from the strict enforcement of the condition with respect to cross-examination.

Testimony given at a proceeding not a trial may be inadmissible, because the nature of the proceeding was such that it cannot be fairly said that the issues and parties are identical with those at the trial where the testimony is offered. Thus, testimony given at a coroner's inquest has been held to be inadmissible in a subsequent action to recover damages for causing the death of the deceased.[118]

It has also been held that depositions before trial taken in a previous action, as well as testimony given at the trial, are admissible in a later action between the same parties.[119] This is consistent with the idea that such depositions are a part of the trial of the case, and are to be treated the same as oral testimony given at the trial.[120]

DECLARATIONS MADE IN THE REGULAR COURSE OF BUSINESS.

170. The fact that declarations are made in pursuance of the routine belonging to the conduct of a regular business is held to give them a sufficient credibility to make them admissible as evidence, under circumstances and within limitations varying in the different jurisdictions.

referee, in reference proceedings which were afterwards declared by the court irregular and of no effect, see McAdams' Ex'rs v. Stilwell, 13 Pa. 90, 96. It has been held that where, in a proceeding before a referee, before the completion of the evidence the referee dies, and also the witness whose testimony is in question, such testimony may be used upon a subsequent hearing before another referee. Taft v. Little, 178 N. Y. 127, 70 N. E. 211. Where the court had no jurisdiction on the former proceeding, and an objection was made by the party on this ground, the fact that he proceeded with the cross-examination does not make the testimony given on the trial admissible in a subsequent action between the same parties. Deering v. Schreyer, 88 App. Div. 457, 85 N. Y. Supp. 275.

[118] Cook v. Railroad Co., 5 Lans. (N. Y.) 401; Boehme v. Sovereign Camp of Woodmen of the World, 36 Tex. Civ. App. 501, 85 S. W. 444.

[119] Radclyffe v. Barton, 161 Mass. 328, 37 N. E. 373; Roe v. Jones, 3 L. C. 58.

[120] Ante, p. 284.

Having treated somewhat fully the subject of declarations made under oath, we come next to several classes of declarations which are held admissible as exceptions to the hearsay rule, under the same theory but upon widely-differing grounds of special credibility. First of these is that of declarations made in the regular course of business. It is the distinguishing feature of the admission of all declarations, under this class of exceptions to the hearsay rule, that they must have some badge of truthfulness besides the mere fact of having been made. In the case of declarations under oath, it was the oath which gave the necessary guaranty of reliability.

In the case of declarations made in the regular course of business, this guaranty of special reliability is found in the correctness which usually appertains to the performance of routine work. A regular practice with respect to the conduct of a business, which involves the making of entries as to transactions carried on, contemporaneously with such transactions, and without contemplation of the use of such entries in any controversy, usually assures a high degree of correctness. This has been recognized by the courts, and upon it they have founded an exception to the hearsay rule;[121] or, it might be said, with more exactness, two exceptions to that rule. The first is that which embraces shop-book entries made in the books of parties to the action by the parties themselves or their clerks; the second, that which covers entries made by strangers to the action.

[121] Livingston v. Arnoux, 56 N. Y. 507, 518. In this case, a receipt given by a sheriff, since deceased, was offered as evidence of payment. The court refers to it as follows (page 518): "Although giving a receipt on payment being made was not strictly an official act, it was a proper and reasonable one, in the ordinary course of business, and within the general scope of his authority and duty. * * * Entries and memoranda, made by persons, since deceased, in the ordinary course of professional and official employment, are competent secondary evidence of the facts contained in them, when they had no interest to misrepresent or misstate them. They are admitted from necessity."

SAME—SHOP-BOOK RULE.

171. From very early times entries made in shop books relating strictly to items for goods sold and delivered or work and labor performed have been held admissible.

Formerly a party to an action was not permitted to testify in his own behalf. An apparent exception to this rule, however, existed in the application of the so-called "shop-book rule." In early times in England parties were permitted to show, by entries made in their books, the sale of goods or performance of labor; and this was so well recognized a doctrine that a statute was passed relating to it.[122] Later developments narrowed the rule to the cases where the entries were made by a clerk.[123] This, doubtless, seemed to the courts more consistent with the doctrine that a party could not be a witness for himself. The clerk himself was a competent witness, and entries made by him were considered equally unobjectionable. Authentication of the entries was required by the clerk who made them, if living and within reach; if he was not, proof of his handwriting was considered sufficient.[124] The rule with respect to entries by a party in his own books did not meet with much favor from the English judges in later times, and survived only in the minor courts.[125] Its development originally, its modern application in England, and its explanation and justification on the part of the courts in this country, illustrate the fact that it is a rule which has drawn its vitality

[122] St. 7 Jac. I. c. 12 (1609). This act will be found quoted in Thayer, Cas. Ev. (2d Ed.) 507, together with a very interesting note on the English law relating to this subject, in which he shows the rule was questioned as early as 1661. See, also, Omychund v. Barker, 1 Atk. 21, 49.

[123] Cooper v. Marsden, 1 Esp. 1.

[124] Pitman v. Maddox, 1 Ld. Raym. 732; Price v. Earl of Torrington, 2 Ld. Raym. 873.

[125] See quotation from a judge of an English county court in Thayer, Cas. Ev. (2d Ed.) pp. 507, 509. See, also, Glynn v. Bank, 2 Ves. Sr. 38; Brain v. Preece, 11 Mees. & W. 773.

from the necessities imposed on the courts by the contemporaneous methods of business.[126]

172. AMERICAN DOCTRINE—In this country entries made by a party or his clerk in account books, which appear to be fairly and regularly kept as a contemporaneous record of daily business, are admissible, provided the books are properly authenticated.

It will be observed that the rule as stated applies only to entries in the books of a party to the suit. This is the feature which distinguishes the shop-book rule from the rule as to entries made in the regular course of business, which will be referred to shortly. The two are distinct rules, though it is like-

[126] In Omychund v. Barker, 1 Atk. 21, Lord Chancellor Hardwicke says (page 49): "A tradesman's books are admitted as evidence through no absolute necessity, but by reason of a presumption of necessity only, inferred from the nature of commerce." See, also, Woodnoth v. Lord Cobham, Bunb. 180; Ford v. Hopkins, 1 Salk. 283; Faxon v. Hollis, 13 Mass. 427; Smith v. Rentz, 131 N. Y. 169, 30 N. E. 54, 15 L. R. A. 138; Pratt v. White, 132 Mass. 447; Eastman v. Moulton, 3 N. H. 156; Poultney v. Ross, 1 Dall. (Pa.) 238, 1 L. Ed. 117. In Poultney v. Ross, supra, we find in the opinion the following: "As the law that has prevailed upon this subject is adapted to the peculiar situation of the country, it will naturally differ from the law which is established in other places under different circumstances. Thus, though, in England, the shop book of a tradesman is not evidence of a debt without the assistant oath of the clerk who made the entry, yet here, from the necessity of the case, as business is often carried on by the principal, and many of our tradesmen do not keep clerks, the book proved by the oath of the plaintiff himself has always been admitted." The rule having become thoroughly established prior to the statutory removal of the disability from parties to the suit to act as witnesses, it was not an easy matter to abolish it; in fact, the courts decided to retain the rule rather than attempt its abolition. See Swain v. Cheney, 41 N. H. 232; Stroud v. Tilton, 4 Abb. Dec. (N. Y.) 324; Alabama Const. Co. v. Wagnon Bros., 137 Ala. 388, 34 South. 352. In Brown v. Bronson, 93 App. Div. 312, 87 N. Y. Supp. 872, it was held that entries made by a party himself in his cash book would not be admitted as against the party against whom the entries were made; but, where the cash book entries were made by a bookkeeper, the cash book was admitted, although authenticated by the testimony of the party himself as to the method of bookkeeping. Clark v. Bank, 164 N. Y. 498, 58 N. E. 659.

ly that the latter found its origin in suggestion derived from the former.[127] The shop-book rule is concerned with written entries only; the other, in England at least, covers both written and oral. The shop-book rule covers entries made in shop or account books only; the other is much broader, and includes entries made in all books and documents. In the case of the one rule, the entries are admissible, whether the party be living or dead; in the other, they are admissible only in the event of death or other equivalent disability. Subject to these limitations, which will be explained more fully in the following pages, entries in shop books are generally held admissible.[128]

173. ENTRIES MUST BE ORIGINAL—To be admissible, the entries must be original entries, reasonably contemporaneous with the events which they chronicle.

It is in the fact that the entries are made at the time, as part of a regular business record, that the guaranty of their reliability is found. It is essential, therefore, that they be the origi-

[127] Thayer, Cas. Ev. (2d Ed.) p. 509, note. And see Sutton v. Gregory, Peake, Additional Cas. 105; Pritt v. Fairclough, 3 Camp. 305; Poole v. Dicas, 1 Bing. N. C. 649, all of which are printed in Thayer's Cases on Evidence.

[128] Pratt v. White, 132 Mass. 477; Vosburgh v. Thayer, 12 Johns. (N. Y.) 461; Lassone v. Railroad Co., 66 N. H. 345, 24 Atl. 902, 17 L. R. A. 525; Thomson v. Porter, 4 Strob. Eq. (S. C.) 58, 53 Am. Dec. 653; 3 Dane, Abr. 318; Ford v. Cunningham, 87 Cal. 209, 25 Pac. 403; Bradley v. Goodyear, 1 Day (Conn.) 104; Foster v. Sinkler, 1 Bay (S. C.) 40. Professor Thayer says (in a note on page 517 of his Cases on Evidence, 2d Ed.), of the doctrine as it developed in the United States: "But in Massachusetts, as in the other colonies, the influence of the English superior courts was powerfully felt, and in a great degree it was authoritative. The use of account books here, supported by the oath of the party, was too firmly fixed to be set aside by the courts; but it was discredited by the utterances of English judges, and as time went on, and the earlier law passed out of sight, it came to have the aspect of a loose, provincial variation, that 'broke in,' as Lord Hardwicke said, 'on the original strict rules of evidence'—that figment of the judicial imagination. Accordingly it was surrounded with all sorts of limitations and qualifications, varying in different colonies, and impossible anywhere to reduce to rule. At present the older states, it would seem, might well follow some of the newer ones in allowing the unhampered use of such books. They would thus rid

nal entries, and not subsequently posted ones.[129] The fact, however, that temporary memoranda were originally made, and the entries then made from them in the books, does not make them inadmissible. They will still be considered original entries;[130] but if the temporary memoranda were made by another party, and then copied from the memoranda into the account book, they will not be admitted.[131] It is also essential that the entires be contemporaneous. This feature is one which is for the determination of the court. Whether an entry fulfills this condition will depend upon the circumstances in each particular case. The course of business may require an entry to be made within an hour, or not until the next day. In each case, it is conceived, the entry would be held sufficiently contemporaneous.[132] If, however, the entry which should in regu-

themselves of certain irregular fragments of the law which came about in a great degree from a misapprehension of the older law, and have lost their main reason for existence, since parties have been allowed to testify."

[129] Griesheimer v. Tanenbaum, 124 N. Y. 650, 26 N. E. 957; Rumsey v. Telephone Co., 49 N. J. Law, 322, 8 Atl. 290; Lassone v. Railroad Co., 66 N. H. 345, 358, 24 Atl. 902, 17 L. R. A. 525; Woodbury v. Woodbury's Estate, 50 Vt. 152; Fitzgerald v. McCarty, 55 Iowa, 702, 8 N. W. 646; Montgomery County v. Bean, 82 S. W. 240, 26 Ky. Law Rep. 568.

[130] Faxon v. Hollis, 13 Mass. 427; McGoldrick v. Traphagen, 88 N. Y. 334; Hoover v. Gehr, 62 Pa. 136; Hall v. Glidden, 39 Me. 445; Landis v. Turner, 14 Cal. 573. Faxon v. Hollis, supra, was a case where the plaintiff, to prove his account, introduced an account book kept in ledger form. It appeared that he made memoranda of his transaction on a slate, and afterwards entered them more fully and regularly in his book, and erased the slate memoranda. Under these circumstances the court held that the entries would be deemed original entries.

[131] Schnellbacher v. Plumbing Co., 108 Ill. App. 486. In this case the entries were copied from time books kept by laborers who handed them in to the bookkeeper.

[132] Bay v. Cook, 22 N. J. Law, 343, 353; Redlich v. Bauerlee, 98 Ill. 134, 38 Am. Rep. 87; Landis v. Turner, 14 Cal. 573; Chicago, St. L. & N. O. R. Co. v. Provine, 61 Miss. 288, 292. In Yearsley's Appeal, 48 Pa. 531, entries made once a week of the weekly services are held sufficiently contemporaneous. In Hall v. Glidden, 39 Me. 445, the entries were made from memoranda on a slate two to four weeks after written on the slate, and they were held admissible. It appeared that the plaintiff's regular practice was to wait until the slate

lar course be made within the hour were delayed until the next day, it would not be admitted.[183] The element of contemporaneousness will be further considered in a subsequent section under an analogous subject.[184]

174. RULE CONFINED STRICTLY TO SHOP BOOKS—The admission of entries of this sort is confined strictly to shop or account books, and does not extend to other books of record.

Doubtless the limitation of the rule was due to the feeling that it must not get away from the element of "regular routine," or "daily course of business," upon which the credibility of the entries rests to so large an extent. Thus, memorandum books, check-stub books, invoice books, and cash books have all been held not to come within the rule.[185] If, however, it is

was full, and then make the entries, and that, as he had very few transactions to record, it took some time. But see, contra, Forsythe v. Norcross, 5 Watts (Pa.) 432, 30 Am. Dec. 334. In Barker v. Haskell, 9 Cush. (Mass.) 218, Bigelow, J., says (page 220): "Although the rule is well settled that the entries, to be competent, must have been made at or near the time the charges were incurred, it does not fix any precise time within which they must be made. There is no inflexible rule requiring them to be made on the same day. In this particular every case must be made to depend very much upon its own peculiar circumstances, having regard to the situation of the parties, the kind of business, the mode of conducting it, and the time and manner of making the entries. Upon questions of this sort much must be left to the judgment and discretion of the judge who presides at the trial, because, having the books before him, and understanding all the circumstances of the case, he is better able to decide upon all questions involving the fairness and regularity of the entries sought to be proved."

[183] In Henshaw v. Davis, 5 Cush. (Mass.) 145, it was held that a single entry for three months' labor showed on its face that it was not contemporaneous, and that it was inadmissible.

[184] Post, § 183, p. 312.

[185] The following authorities illustrate some of the different books which have been excluded: Memorandum book. Richardson v. Emery, 23 N. H. 220. Check book. Wilson v. Goodin, Wright (Ohio) 219. Loan register of broker. Security Co. v. Graybeal, 85 Iowa, 544, 52 N. W. 497, 39 Am. St. Rep. 311. Memoranda or cash books, or books of occasional entry. Kotwitz v. Wright, 37 Tex. 82. Book of account with one person only. In re Fulton's Estate, 178 Pa. 78,

a regular account book, the form or the name is immaterial.[186] The fact that a book of original entry contains some entries which are not original does not render inadmissible the whole book.[187]

175. DEATH NOT ESSENTIAL TO ADMISSIBILITY—Entries of this sort are admissible, whether the person making them be living or dead.

The shop-book rule had no connection with the rules which relate to declarations of deceased persons. In fact, the books required a certain authentication, to render entries admissible, which could be better supplied in case the bookkeeper was living and present as a witness. If, however, he was deceased, or under any other disability, so that his testimony could not be had, the admissibility of the entries was not affected, except so far as a difficulty of proper authentication resulted.

176. AUTHENTICATION OF ENTRIES—The entries must be properly authenticated by the testimony of the bookkeeper, or, in case of his death or other disability, by proof of his handwriting.

The bookkeeper may be the party himself, or a clerk. In either case, the entries are admissible if they comply with the conditions in other respects and are properly authenticated in accordance with the rule above stated.[188] When the shop-book

87, 35 Atl. 880, 35 L. R. A. 133. Slips purporting to contain memoranda of telephone communications embodying orders for sale of cotton. Jacobs v. Cohn (Sup.) 91 N. Y. Supp. 339. Stub entries in check books. Simons v. Steele, 177 N. Y. 542, 69 N. E. 1131.

[186] Wells v. Hatch, 43 N. H. 246; Bonnell v. Mawka, 37 N. J. Law, 198; Toomer v. Gadsden, 4 Strob. (S. C.) 193; Post v. Kenerson, 72 Vt. 341, 47 Atl. 1072, 52 L. R. A. 552, 82 Am. St. Rep. 948.

[187] Chisholm v. Machine Co., 160 Ill. 101, 113, 43 N. E. 796; Handy & Co. v. Smith, 77 Conn. 165, 58 Atl. 694.

[188] Stroud v. Tilton, 4 Abb. Dec. (N. Y.) 324; McGoldrick v. Traphagen, 88 N. Y. 334; Holbrook v. Gay, 6 Cush. (Mass.) 215; Miller v. Shay, 145 Mass. 162, 13 N. E. 468, 1 Am. St. Rep. 449; New Haven & Northampton Co. v. Goodwin, 42 Conn. 230; Curren v. Crawford, 4 Serg. & R. (Pa.) 3; Elms v. Chevis, 2 McCord (S. C.) 349; Robinson v. Dibble's Adm'r, 17 Fla. 457.

rule originated, parties to the action were not permitted to testify. This, however, seems to have had no influence in leading to the establishment of the rule; for the subsequent qualification of parties as witnesses had no effect in changing it.[139]

177. EXTENSION OF RULE—The rule has in some jurisdictions been extended to cover books of account kept by attorneys, physicians, and other professional men.[140]

There has been in some jurisdictions a disposition to apply the rule wherever it can be applied safely and properly, to the end that substantial and prompt justice may be done; and in this view there seems to be no reason why it should be confined to the trades exclusively. If persons in professional life have a regular and daily routine in the conduct of their business, which involves the making of entries of transactions in books of account, they have the same force and element of reliability which entries made by persons in commercial lines have.

178. RULE RESTRICTED AS TO AMOUNT INVOLVED—The shop-book rule is confined in its application to cases where the entries involve small amounts.

The cases hold quite generally that entries in a party's own books will not be received to prove large and important transactions. In the case of entries showing cash items, the limit in amount is usually about $10. This comes from the limitation adopted by the English judges of 40 shillings. The reason for any limitation at all appears to lie in the fear that, in case of large amounts, entries might be altered, or, in the first instance, made, for the purpose of use in sustaining erroneous charges. Very probably the temptation to make self-serving entries would be greater, and the entries entitled to less general credi-

[139] Stroud v. Tilton, 4 Abb. Dec. (N. Y.) 324; Swain v. Cheney, 41 N. H. 232. But see Nichols v. Haynes, 78 Pa. 174, which seems to hold that, since the statute making parties competent as witnesses, these books can only be used to refresh memory.

[140] Attorney's books. Codman v. Caldwell, 31 Me. 560. Physician's books. Bay v. Cook, 22 N. J. Law, 343. Books of hospital proprietors. Ganahl v. Shore, 24 Ga. 17, 23.

bility, in case of important matters involving large amounts. The limitation, so far as cash items are concerned, seems to be clearly established.[141] As to items for goods sold, labor performed, and the like, the limitation does not seem to be so definite, though the practice is to exclude the entries in case the values are considerable.[142]

179. SCOPE OF PROOF—Shop-book entries are admissible only to prove items of goods sold or labor and services performed. They are not admissible to show to whom credit was given, or other matters collateral to the items above mentioned.

The cases usually arising where shop-book entries are offered are those in which there is a dispute as to the items or amount of goods sold or services rendered. Where the controversy extends beyond this, and it is disputed that the plaintiff ever had dealings with the defendant, such entries cannot be used as evidence to charge the defendant.[143] For example, if goods were delivered to A., but the plaintiff claims that he gave credit to B., who ordered them, he cannot put his entries in to show that the items were charged to B., instead of A.[144] Nor can loans, payments made on behalf of another, or other cash transactions of any size, be proved in this way.[145] A per-

[141] Davis v. Sanford, 9 Allen (Mass.) 216; Kelton v. Hill, 58 Me. 114; Silver v. Worcester, 72 Me. 322; Rich v. Eldredge, 42 N. H. 153, 158.

[142] Bustin v. Rogers, 11 Cush. (Mass.) 346, where an entry showing a charge of $300, for "seven gold American watches," was excluded. It is sometimes by statute limited to small amounts, as in North Carolina. See Alexander v. Smoot, 35 N. C. 461.

[143] Ball v. Gates, 12 Metc. (Mass.) 491; Keith v. Kibbe, 10 Cush. (Mass.) 35; Dexter v. Booth, 2 Allen (Mass.) 559; Field v. Thompson, 119 Mass. 151.

[144] Kaiser v. Alexander, 144 Mass. 71, 78, 12 N. E. 209; Cooley v. Collins, 186 Mass. 507, 71 N. E. 979.

[145] Davis v. Sanford, 9 Allen (Mass.) 216; Smith v. Rentz, 131 N. Y. 169, 30 N. E. 54, 15 L. R. A. 138; Case v. Potter, 8 Johns. (N. Y.) 211; Eastman v. Moulton, 3 N. H. 156; Wilson v. Wilson, 6 N. J. Law, 95; Bradley v. Goodyear, 1 Day (Conn.) 104; Rothschild v. Sessell, 103 Ill. App. 274; Bouldin v. Rice Mills Co. (Tex. Civ. App.) 86 S. W. 795. In Griesheimer v. Tanenbaum, 124 N. Y. 650, 26 N.

son for whom labor was performed will not be permitted to introduce his books in a suit against him to show the time of service or the rate of wages;[146] nor are such entries admissible to prove other matters collateral to the question of the services performed.[147]

SAME—ENTRIES MADE BY STRANGERS.

180. Entries made in the regular course of business in the books of strangers to the suit are admissible, whether made by a principal or by a subordinate, where the person who made them is either dead or unable to testify by reason of some equivalent disability.

The development of this branch of the exception as to entries in the regular course of business has been somewhat different in America from what it has been in England. It was originally an easy step from the ancient shop-book rule, which was a violation both of the rule against hearsay and that which prevented parties to the suit from testifying, to the admission of entries made by strangers to the suit and their clerks; and, having taken this step, and found themselves rid of the objection that they were permitting parties to the suit to testify, the courts the more readily extended the doctrine to matters not within the original shop-book rule, and created a new and important exception to the rule against hearsay.[148] In an early Massachusetts case Parker, C. J., discusses the propriety of this sort of evidence and comes to the following conclusion: "What a man has said when not under oath may not, in general, be given in evidence when he is dead. * * * But what a man has actually done and committed to writing, when under obligation to do the act, it being in the course of the business he has undertaken, and he being dead, there seems to be no danger in submitting to the consideration of the jury."[149]

E. 957, it was held that entries of this sort could not be used to prove the terms of a special contract. But see, contra, Swain v. Cheney, 41 N. H. 232.

146 Silver v. Worcester, 72 Me. 322, 330.

147 Mattingly v. Shortell, 85 S. W. 215, 27 Ky. Law Rep. 426.

148 Doe v. Turford, 3 Barn. & Adol. 890.

149 Welsh v. Barrett, 15 Mass. 380, 386.

It is to be noted that there is sometimes a limit as to what such entries will be received for. In one case, where the question was whether A., the plaintiff, had committed an act of insolvency, which turned mainly upon the point of where an arrest of A. on a certain date had taken place, the defendant, to prove the place of arrest, called one B., an assistant of a deputy sheriff, W., who had since died. B. testified that he went to A.'s house on the said date with W., and arrested A. there. To meet this evidence the plaintiff called the undersheriff, who produced a certificate, signed by W., in which it was stated that W. had arrested A. in S. M. street, and said that deputy sheriffs were required to turn in such certificates immediately after making arrests. The court held that, while the fact of the arrest might be proved by such an entry, the doctrine would not be extended to cover other collateral matters stated in an entry.[150]

181. AS TO ORAL DECLARATIONS—The exception in America is confined to written entries; in England it extends to oral declarations as well.

It has recently been held, however, by an English Court, that a declaration made by a physician to a patient with respect to the cause of her illness was inadmissible, and it may indicate a tendency to a narrowing of the rule.[151]

[150] Chambers v. Bernasconi, 1 Cromp. & J. 451. Bayley, B., says (page 458): "I doubt, even supposing this paper was receivable at all, whether it was receivable to prove the place where the arrest happened. It may be the duty of the sheriff's officer to make a return to the sheriff that he has made the arrest, but it is not a necessary part of that duty that he should state the particular place of the arrest." It will be observed that the opinion is based on the fact of absence of duty to report place of arrest. If it were concededly the duty of the officer to report the place as well as the fact of arrest, quære, whether it would not be admissible. See Lord Denman's opinion in same case in the exchequer chamber (Cromp., M. & R. 347, 367), when he says: "Admitting, then, for the sake of argument, that the entry tendered was evidence of the fact, and even of the day when the arrest was made (both which facts it might be

[151] Dawson v. Dawson, 22 T. L. R. 52. A comment on this case will be found in 19 Harvard Law Rev. 301.

The generally prevailing doctrine in America requires that the declarations be in writing; the exception relates to entries strictly speaking, and does not extend to oral statements.[152] In England the development was somewhat broader, and extended to oral declarations made in the performance of duty.[153]

182. MEANING OF "REGULAR COURSE OF BUSINESS"—By "regular course" is meant regular routine, followed in the daily conduct of a business. The exception does not extend to all entries made in connection with the carrying on of a business.

In respect to the conditions under which entries are made, the English and American doctrines have developed along different lines. In England, the tendency was to emphasize the element of duty. It was required that the entry be one which the person had made in the performance of a duty.[154] It was

necessary for the officer to make known to his principal), we are all clearly of the opinion that it is not admissible to prove in what particular spot within the bailiwick the caption took place, that circumstance being merely collateral to the duty done." See, also, Smith v. Bleakey, L. R. 2 Q. B. 332.

[152] Manning v. School Dist. No. 6, 124 Wis. 84, 102 N. W. 356, where the verbal report of an expert made in the course of his employment was held inadmissible. Nor is the statement made by the cashier of a bank to a customer admissible. Equitable Mfg. Co. v. Howard, 140 Ala. 252, 37 South. 106.

[153] In the Sussex Peerage Case, 11 Clark & F. 85, Lord Campbell says (page 113): "By the law of England the declarations of deceased persons are not generally admissible unless they are against the pecuniary interest of the party making them. There are two exceptions: First, where a declaration, by word of mouth or by writing, is made in the course of business of the individual making it, there it may be received in evidence, though it is not against his interest," —and cites Doe v. Turford, 3 Barn. & Adol. 890. See, also, Stapylton v. Clough, 2 El. & Bl. 933, 937. In Reg. v. Buckley, 13 Cox, Cr. Cas. 293, which was a trial for murder, the prosecution offered to show the verbal report of the deceased, who was a constable, to his superior officer, as to where he was going on the night of the murder. It seems he had reported that he was going to watch the accused, who on a previous occasion had been convicted of larceny, chiefly on the evidence of deceased. It was held admissible.

[154] In Reg. v. Inhabitants of Worth, 4 Adol. & E. 132, an entry made by an employer in which he regularly kept minutes of his con-

not sufficient that the entry was made in the regular routine of business. The person making it must have been under a duty either to the public or to a private employer to make it. In America the general doctrine is that the entry will be admissible if made in the ordinary course of business without regard to the existence of any special duty in reference to it.[155]

183. MUST BE CONTEMPORANEOUS—To be admissible, the entries must be original, contemporaneous entries; but the fact that they have been first jotted down as memoranda, and shortly afterwards regularly entered, does not destroy their admissibility in this respect.

An entry is an original one if made by the party within whose personal knowledge the fact is. It is immaterial that he may have made the entry in several different places. In such case any one of the entries would be admissible, provided, of course, it satisfied the other requirements as to this exception. It frequently happens that an employé is in the habit of jotting down memoranda of facts to be afterwards entered in the regular course. This is no objection to the admissibility of the entries as finally entered. But the entries are inadmissible if the party making them had at the time no personal knowledge in respect to them.[156]

tracts with his employés was offered and rejected. Lord Denman says (page 137): "In a case of this kind the entry must be against the interest of the party who writes it, or made in the discharge of some duty for which he is responsible." So, also, an entry by a broker in a daybook of his transactions with a firm was held to be inadmissible on the same ground. Massey v. Allen, L. R. 13 Ch. Div. 558, 562.

155 Thus, in a case where a party's age was in question, it was held that an entry of his baptism made by a Roman Catholic priest as a church record, was admissible, though there was no duty imposed on him by law to keep such a record. Kennedy v. Doyle, 10 Allen (Mass.) 161. See, also, Inhabitants of Augusta v. Inhabitants of Windsor, 19 Me. 317.

156 Peck v. Valentine, 94 N. Y. 569. The question in this case came up under the following circumstances: A. sued X. for conversion of funds, and to show that X., who was his (A.'s) agent for the sale of lumber, had not entered in his cashbook all moneys received from sales, called L. as a witness, who testified that he made on a loose

There has been some tendency to broaden the rule, and, in cases where the entries are made pursuant to a regular business duty, to allow them in evidence, even though not made by the original observer.[157] Entries must be contemporaneous with the transactions to which they relate.[158] There is no fixed rule with respect to what length of time between the fact chronicled and the making of the entry may elapse. It is largely a question of fact in each particular case. The nature of the business, the usual methods of carrying it on, the circumstances under which the entry is made, all must be considered in determining this question.

184. BY WHOM ENTRIES MADE—Entries are admissible, whether made by a principal or subordinate, by an employer or employé.

It is quite clear that there is a difference with respect to the ground of reliability between entries made by a tradesman himself and entries made by his clerk. So far as the absence of self-interest resulting from the perfunctory nature of the act

piece of paper memoranda of sales for 18 days, and gave the memoranda to A. A. then testified he had copied the memoranda into a book, and produced the book, but said he had lost the original memoranda. The court excluded the entries. Another case having some points of similarity may be compared with this, namely, Mayor, etc., of New York v. Railway Co., 102 N. Y. 572, 7 N. E. 905, 55 Am. Rep. 839. To prove the number of days' work performed and the quantity of material used in the repair of a street, the defendant offered in evidence a time book and memorandum book kept by a foreman. The entries were made in these books by the foreman upon the report to him twice a day of the facts by the gang foremen. The foreman identified the entries, and the gang foremen testified that they correctly reported to the foreman the facts. It was held that the entries were admissible. The court itself distinguished this case from the case of Peck v. Valentine by the fact that the latter was the case of a mere private memorandum, while in this case the entries were made and the books kept in the regular course of business.

[157] Drumm-Flato Commission Co. v. Bank, 107 Mo. App. 426, 81 S. W. 503; see note and cases cited 18 Harvard Law Rev. 52.

[158] Poole v. Dicas, 1 Bing. N. C. 649; Norman Printers' Supply Co. v. Ford, 77 Conn. 461, 59 Atl. 499; Wells v. Hobson, 91 Mo. App. 379.

goes, an entry made by a clerk is much more likely to be reliable than one made by the proprietor. How far the greater interest in having a proper and accurate record of his business transactions on the part of the proprietor would offset this may be a pertinent query. The courts generally looked at it from the other standpoint, and accordingly were at first inclined to exclude entries made by tradesmen in their own books as self-serving, while admitting those made by clerks.[159] Subsequently the exception was extended to include the former class of entries, and this is the generally accepted doctrine to-day.[160] The illustrations afforded by the cases of the application of the exceptions cover all classes of business, and the professions as well.[161] The cases of entries with respect to the presentation and protest of bills and notes by bank employés and notaries are quite common.[162] Such entries are always admitted, and are excellent illustrations of the advantage of the exception in the proof of formal matters which it would be quite burdensome to require to be proved by direct evidence.[163]

185. WHAT DISABILITIES SUFFICIENT—The general doctrine in America is that death, insanity, or absence from the jurisdiction will justify the admission of the entries;[164] and in some states they are admitted, though the party be present in court, if duly authenticated by him. In England the exception is confined to cases of death alone.

[159] Ellis v. Cowne, 2 Car. & K. 719; Bland v. Warren, 65 N. C. 372.

[160] Dane, Abr. c. 81, art. 4, § 7; Curren v. Crawford, 4 Serg. & R. (Pa.) 3; Vosburgh v. Thayer, 12 Johns. (N. Y.) 461; Foster v. Sinkler, 1 Bay (S. C.) 40. The doctrine is usually based by the courts on necessity; it being said that "from the necessity of the case, as business is often carried on by the principal, and many of our tradesmen do not keep clerks, the book, proved by the oath of the plaintiff himself, has always been admitted."

[161] Entries by a Catholic priest, Kennedy v. Doyle, 10 Allen (Mass.) 161; by a doctor, Inhabitants of Augusta v. Inhabitants of Windsor, 19 Me. 317; by a bank teller, Henry v. Oves, 4 Watts (Pa.) 46.

[162] Poole v. Dicas, 1 Bing. N. C. 649; Welsh v. Barrett, 15 Mass. 380; Nicholls v. Webb, 8 Wheat. (U. S.) 326, 5 L. Ed. 628.

[163] See opinion of Shaw, J., in Shove v. Wiley, 18 Pick. (Mass.) 558.

[164] Three cases in Massachusetts illustrate the development of the

The early rule was that such entries would be allowed only in case of the death of the person making them. This was the original rule in this country as well as in England;[165] but it was soon extended to cases of insanity and where the witness had absconded.[166] It is the practice in several of the states now to receive such entries even though the witness be living. It is not meant that they are received to refresh the witness' memory, which has always been allowable, but that they are admitted as themselves evidence, though the witness swears they do not refresh his memory.[167]

DECLARATIONS AGAINST INTEREST.

186. Declarations, oral or written, of deceased persons, made while the declarants were in a position to know of the matters stated, and which are against pecuniary or proprietary interest, are admissible.[168]

Declarations against interest must not be confused with admissions or confessions. They are received upon totally differ-

rule: Union Bank v. Knapp, 3 Pick. (Mass.) 96, 15 Am. Dec. 181; North Bank v. Abbot, 13 Pick. (Mass.) 465, 25 Am. Dec. 334; Shove v. Wiley, 18 Pick. (Mass.) 558. See, also, Costello v. Crowell, 133 Mass. 352; Chaffee v. U. S., 18 Wall. (U. S.) 516, 541, 21 L. Ed. 908.

[165] Farmers' Bank of Lancaster v. Whitehill, 16 Serg. & R. (Pa.) 89, where it is said: "It has recently been settled that the memorandums, made at the time, by a person in the ordinary course of his business, of acts and matters which his duty in such business required him to do for others, are admissible evidence of the acts and matters so done after his death. But, if he is living, he must be called." See, also, Welsh v. Barrett, 15 Mass. 380; Nicholls v. Webb, 8 Wheat. (U. S.) 326, 337, 5 L. Ed. 628; Bell v. Perkins, Peck (Tenn.) 261, 14 Am. Dec. 745.

[166] Union Bank v. Knapp, 3 Pick. (Mass.) 96, 15 Am. Dec. 181; North Bank v. Abbot, 13 Pick. (Mass.) 466, 25 Am. Dec. 334.

[167] Guy v. Mead, 22 N. Y. 462; Mayor, etc., of New York v. Railway Co., 102 N. Y. 572, 7 N. E. 905, 55 Am. Rep. 839; Bank of Monroe v. Culver, 2 Hill (N. Y.) 531; Shove v. Wiley, 18 Pick. (Mass.) 558; Perkins v. Insurance Co., 10 Gray (Mass.) 323, 71 Am. Dec. 654; Smith v. Lane, 12 Serg. & R. (Pa.) 80. See, also, note to Price v. Torrington, Smith, Lead. Cas. 572.

[168] A line of prominent early English cases is cited in Thayer, Cas. Ev. (2d Ed.) pp. 474–476, showing the beginnings of the doctrine.

ent principles. As has already been said,[169] admissions and confessions are waivers of proof. Declarations against interest, on the contrary, are admitted as direct evidence of the facts declared. They are the testimony of the deceased declarant, admitted as an exception to the hearsay rule. They find their guaranty of reliability in the circumstance that they are against the interest of the person who made them, and presumably he would not have made them had they been false.[170] Receipts given for money payments,[171] entries in books of account showing receipt of money,[172] or of services,[173] or the existence of indebtedness,[174] and declarations disparaging title to real estate,[175] are a few of the many examples of the application of this exception.[176]

DECLARATIONS MUST HAVE BEEN SPONTANEOUS.

187. Such declarations must have been made prior to the time when there might have been in contemplation their subsequent use as evidence.

The declarations first brought within it seem to have been those contained in receipts and other papers acknowledging the payment of money. See Searle v. Lord Barrington, 2 Strange, 826.

[169] Ante, p. 146.

[170] Framingham Mfg. Co. v. Barnard, 2 Pick. (Mass.) 532; Hinkley v. Davis, 6 N. H. 210, 25 Am. Dec. 457; Baker v. Taylor, 54 Minn. 71, 55 N. W. 823.

[171] Taylor v. Gould, 57 Pa. 152, 156.

[172] Middleton v. Melton, 10 Barn. & C. 317; Heidenheimer v. Johnson, 76 Tex. 200, 13 S. W. 46.

[173] Chase v. Smith, 5 Vt. 556, 559.

[174] Peace v. Jenkins, 32 N. C. 355; Bartlett v. Patton, 33 W. Va. 72, 82, 10 S. E. 21, 5 L. R. A. 523.

[175] Bowen v. Chase, 98 U. S. 254, 262, 25 L. Ed. 47: Ellis v. Harris, 106 N. C. 395, 11 S. E. 248; Tyres v. Kennedy, 126 Ind. 523, 26 N. E. 394.

[176] A rule has been sometimes broadened by statute so as to include declarations against interests other than pecuniary and proprietary. St. Mass. 1898, c. 535, where it is provided that "no declaration of a deceased person shall be excluded as evidence on the ground of its being hearsay, if it appears to have been made in good faith before the beginning of the suit and on the personal knowledge of the declarant." Under the provision of this statute it is held that the declaration of a husband with respect to land devised to him,

If it appear that at the time of the making of the declaration the situation was such that its use in evidence might have been in the mind of the party, the declaration is inadmissible. As an example of what is meant, take the rule as to payment of a bond or other sealed obligation being assumed after 20 years. If payment of a bond be in question, and an indorsement of interest on the bond by the obligee be offered to prove that it was not paid, such indorsement is admissible only in case it appears to have been made before the expiration of the 20-years limitation.[177] If made afterwards, it might have been for the purpose of avoiding the effect of the rule. This is a matter, however, where the effectiveness of the evidence is concerned, rather than the admissibility. The rule—a presumption, as it is called in the cases—is an absolute rule of law, and the evidence, whether a declaration against interest or evidence of another sort, is ineffective in opposition to the rule.[178] The principle referred to in the heading goes to the good faith of the declarations. They must appear to have been spontaneous. and made with no ulterior purpose, nor, indeed, with any apparent opportunity for the existence of such a purpose.[179]

with power to convey it whenever conducive to his comfort, to the effect that he had conveyed it in order that his children might inherit, was admissible. Stocker v. Foster, 178 Mass. 591, 60 N. E. 407.

[177] Gleadow v. Atkin, 1 Cromp. & M. 408, 424. A good illustration of the same declaration being in favor or against the interests of a party according to circumstances of the suit is found in Mutual Life Ins. Co. v. Logan, 87 Fed. 637, 31 C. C. A. 172. Here it was held that a declaration of a deceased policy holder, acknowledging liability on a premium note, was inadmissible; the suit being on the policy of insurance. Had the suit been on the note against the estate of the maker, the declaration would, of course, have been admissible, perhaps not as within this exception, so much as being within the ordinary rule as to admission.

[178] Glynn v. Bank, 2 Yes. Sr. 38, 43.

[179] Searle v. Lord Barrington, 2 Strange, 826; Johnson v. Cole, 178 N. Y. 364, 70 N. E. 873.

MUST BE AGAINST PECUNIARY OR PROPRIETARY INTEREST.

188. Declarations are against interest, within the principle of this exception, only when they are against the pecuniary or proprietary interest of the person making them.

The law does not recognize in this connection any purely sentimental interest. It must be a money or property interest which is prejudiced by the declaration in order to bring it within the exception.[180] The interest must be a present, immediate interest, and not contingent upon some remote event happening. Thus an entry admitting the receipt of cases of goods was held not against interest on the ground it would make the party liable only in the event of the goods being lost.[181] A statement is against pecuniary interest when its tendency is to take away from or lessen the pecuniary value of property of the person making the declaration or impose upon him pecuniary liability of any kind.[182] It is against proprietary interest when

[180] Com. v. Densmore, 12 Allen (Mass.) 535, 537; Tate v. Tate's Ex'r, 75 Va. 522, 532; Hart v. Kendall, 82 Ala. 144, 147, 3 South. 41; Helm v. State, 67 Miss. 562, 572, 7 South. 487; Hosford v. Rowe, 41 Minn. 245, 42 N. W. 1018; Poorman v. Miller, 44 Cal. 269. But see Coleman v. Frazier, 4 Rich. Law (S. C.) 146, 153, 53 Am. Dec. 727. In Western Maryland R. Co. v. Manro, 32 Md. 280, it was held that a declaration by an officer that a subscriber had paid him five dollars on account of a subscription to stock was not against interest, within the meaning of the exception. A peculiar case arose in Locklayer v. Locklayer, 139 Ala. 354, 35 South. 1008, where a statement made by deceased to a court that he was a negro was admitted—an unjustifiable extension, it would seem, of the rule. A declaration by deceased that his lungs were weak was held inadmissible, in an action on a policy insuring him in case of death resulting solely from accident; it being held that such declaration was not against his pecuniary interests, since it would not in any way increase his premiums or assessments, or lessen his interests in the policy. Railway Officials' & Employees' Acc. Ass'n v. Coady, 80 Ill. App. 563.

[181] Smith v. Blakey, L. R. 2 Q. B. 326.

[182] A peculiar case, illustrative of the nature of the interest contemplated by the rule, is found in Humes v. O'Bryan, 74 Ala. 64: A. brought suit against X. and Y. as partners. Y. having died, the

it tends to cast reflections or doubts upon the ownership of property by the person making the declaration. The pecuniary or proprietary interest must be positive and tangible, in order to render declarations against it admissible. The mere absence of interest does not satisfy the condition that the statement must be against interest.[183] The interest must be possessed by the party at the time of the making of the declarations. Declarations made prior to the acquiring of the interest, or after parting with it, are not admissible.[184]

suit was pressed against X. alone. X. denied his partnership with Y., and to prove his case offered declarations made by Y. to the effect that he (X.) was not a partner. It appeared that the business in which it was claimed X. was a partner was, at the time Y. made these declarations, insolvent. The court held that this fact made the declarations against interest, within the exception, saying (page 79): "This fact, it must be noticed, is of vital importance, as affecting the question of interest. In the absence of the fact of insolvency, it is manifest that the converse proposition that Humes [X.] was a partner of the declarant would be a declaration against his interest. This is so because, if true, it would entitle Humes to a half interest in the partnership assets. * * * The assertion, therefore, that Humes was not a partner, having been made at a time when the partnership business had failed, it was a declaration exonerating him from a pecuniary liability for the partnership debts, and, if true, to this extent doubled the ultimate amount of Glover's [Y.'s] liability. * * *" An example of a declaration of partnership, such as cited above, which was held to be admissible as against interests, is found in Card v. Moore, 173 N. Y. 508, 66 N. E. 1105, which was a case where one partner held in his own name certain property, and it was held, in an action by the surviving partner to recover such property, that statements that a partnership in fact existed, made by a deceased partner, could be introduced. A declaration by a deceased that he was only the guardian of a child has been held to be in favor of his interest, and therefore inadmissible, on the theory that, where adoption of the child was alleged, such declarations, if true, tend to show that neither deceased nor his property would be subject to the obligation resulting from legal adoption. Rulofson v. Billings, 140 Cal. 452, 74 Pac. 35. Accordingly, in White v. Holman, 25 Tex. Civ. App. 152, 60 S. W. 437, we find a declaration that a child was an adopted child was held to be admissible as against interest.

183 Barker v. Ray, 2 Russ. 63, 76.

184 Hutchins v. Hutchins, 98 N. Y. 56, 64; Holmes v. Roper, 141 N. Y. 64, 67, 36 N. E. 180; Beedy v. Macomber, 47 Me. 451; Johnson v. Burks, 103 Mo. App. 221, 77 S. W. 133. It is held that dec-

DEATH A PREREQUISITE.

189. It is well established in England, and generally in this country, that it is only in case of death that such declarations are admitted.

This is one of the cases where the declarations are confined strictly to those of deceased persons. While the fact of their being against interest gives them their character of reliability, it is essential to their use that the persons making them are absolutely prevented by death from appearing and testifying directly to the facts declared. Incapacity to testify is generally held not sufficient to render them admissible,[185] though in some jurisdictions there seems to be a tendency to extend the exception to cases of absolute incapacity.[186]

KIND OF DECLARATIONS ADMITTED.

190. The declarations may be either written or oral.[187]

The cases of oral declarations are not so frequent as those where written entries are involved, but the principle is the same with respect to them, if it appear that they satisfy the conditions of admissibility.[188] The principal cases in which oral dec-

larations made subsequent to parting with title cannot be given in evidence to contradict declarations made while in possession, which have been introduced. Royal v. Chandler, 79 Me. 265, 9 Atl. 615, 1 Am. St. Rep. 305.

[185] Currier v. Gale, 14 Gray (Mass.) 504, 77 Am. Dec. 343; County of Mahaska v. Ingalls, 16 Iowa, 81, 95; Trammell v. Hudmon, 78 Ala. 222; Harrison v. Blades, 3 Camp. 457; Stephen v. Gwenap, 1 Moody & R. 120; Lowry v. Moss, 1 Strob. (S. C.) 63.

[186] Fitch v. Chapman, 10 Conn. 8; Harriman v. Brown, 8 Leigh (Va.) 697, 713.

[187] Reg. v. Overseers of Birmingham, 1 Best & S. 763, 772; Field v. Boynton, 33 Ga. 239. In Massachusetts it seems that oral declarations against pecuniary interests are not admissible, though the exception is recognized as to written entries (Lawrence v. Kimball, 1 Metc. [Mass.] 524); but oral declarations against proprietary interests are admitted (Marcy v. Stone, 8 Cush. [Mass.] 4, 54 Am. Dec. 736).

[188] Bartlett v. Patton, 33 W. Va. 72, 10 S. E. 21, 5 L. R. A. 523.

larations are offered consist of cases where persons in possession of real estate have made statements as to the nature of their holding,[189] though the rule as to the admission of oral declarations is not confined to this class of cases. Oral declarations against interest concerning land have been held to be admissible, on the ground that they were part of the res gestæ.[190]

The doctrine of res gestæ is not, however, the true basis of the admission of this class of declarations. If it were, there

Blackburn, J., says in Reg. v. Overseers of Birmingham, 1 Best & S. 763: "Lastly, is there any distinction in this respect between a written entry and an entry proved by parol? I can see a great difference between them in weight, for a parol statement has in many cases no weight at all. But, when the fact of a parol statement having been made is satisfactorily proved, I cannot see any distinction, as regards admissibility, between it and a written one, and no such distinction is taken in the cases." In County of Mahaska v. Ingalls, 16 Iowa, 81, after a careful examination of the authorities, the doctrine is summed up by the court as follows: "This species of testimony being somewhat anomalous in its character, and standing on the ultima thule of competent testimony, is not highly favored by the courts, and the tendency is rather to restrict than to enlarge the right to receive it, or, at least, to require the evidence to be brought within all the conditions requisite for its reception. From the unbroken current of English, and the decided preponderance of American, authority, we think the present state of the law is that verbal declarations are receivable, when accompanied by the following prerequisites: (1) The declarant must be dead. * * * (2) The next prerequisite is that the declaration must have been against the interest of the declarant at the time, and that interest must be a pecuniary one. * * * (3) The declaration must be of a fact or facts in relation to a matter concerning which the declarant was immediately and personally cognizable. * * * (4) In addition, the court should, upon the circumstances of the particular case, be satisfied that there was no probable motive to falsify the fact declared." Halvorsen v. Lumber Co., 87 Minn. 18, 91 N. W. 28, 94 Am. St. Rep. 669.

189 In Caldwell v. Caldwell, 24 Pa. Super. Ct. 230, the declarations were made by the father, who held title to the land, possession of which was held by a son. The declarations in question, being to the effect that the land had been given by him to his son and belonged to him, were held to be against interest and therefore admissible. But see Butler v. Butler, 133 Ala. 377, 32 South. 579, where similar declarations were held inadmissible.

190 Marcy v. Stone, 8 Cush. (Mass.) 4, 54 Am. Dec. 736; 1 Greenl. Ev. § 109.

would be no reason why declarations in support of title, as well as those disparaging it, should not be allowed.[191] In Massachusetts, where such declarations were originally admitted on the ground of res gestæ, the courts have later come around to the proper view of the matter.[192]

SAME—SCOPE OF DECLARATION AS EVIDENCE.

191. The entire declaration is admissible, though it include statements of fact not in themselves against interest, and, when admitted, the declaration is evidence of all that it states.

The words which are strictly against interest may form only a small portion of a statement or an entry. The context is necessary to explain the matter to which the words refer. It is accordingly held that as much will be admitted as is required to make the matter plain.[193] When once admitted, the entry is evidence of everything which it states, even though it refer to collateral matters.[194]

[191] Tayl. Ev. § 669.

[192] Ware v. Brookhouse, 7 Gray (Mass.) 454.

[193] Higham v. Ridgway, 10 East, 109. In this case the issue was as to the age of X., and an entry in the daybook and ledger of a midwife, showing attendance at the birth of X., the date thereof, a charge for services and medicine, and that the same had been paid, was offered. It was contended that only the word "paid" was admissible. Lord Ellenborough said: "It is idle to say that the word 'paid' only shall be admitted in evidence without the context which explains to what it refers. We must therefore look to the rest of the entry to see what the demand was which he thereby admitted to be discharged. By the reference to the ledger, the entry there is virtually incorporated with and made a part of the other entry of which it is explanatory." To the same effect is Reg. v. Overseers of Birmingham, 1 Best & S. 763.

[194] In one case A., B., and C. were joint makers of a note, which A. paid. He sued B. for the whole sum as the principal debtor, claiming that he himself and C. were sureties. He also sued C. for half of the amount of the note as a co-surety. To prove his case, he offered in evidence a receipt indorsed on the back of the note by the payee, since deceased, acknowledging the payment of a portion of the note, and containing the words, "The £300 having been originally advanced to Evan Humphreys [B.]." It was held that the

But it has been held that, where the declaration contains statements both in favor of the declarant and also against his interest, the court will exclude the entire declaration, if the part favorable to the declarant preponderates.[195]

The question as to what a declaration will be admitted to prove has arisen in the case of receipts, and, although an endeavor was made to confine a receipt to a showing of mere payment, the broader view prevailed, and it is well established that it will be received for all that it covers.[196]

SAME—ADMISSIBILITY TO BE DETERMINED BY THE COURT.

192. The question whether any declaration is against interest, so as to be admissible, is a preliminary question of fact, which the court must determine.

It is the duty of the court to decide primarily whether a declaration is prima facie against the interest of the party making it. If this be decided in the affirmative, the declaration is admissible. After the statement is admitted, the jury may consider the question of its being actually against interest, and determine the weight to which it is entitled. The declaration may be explained by other evidence, or qualified, so as to lose its effect, in which case it may be disregarded by the jury entirely.[197]

receipt was admissible to prove that B. was the principal debtor, though the court expressed a doubt as to the correctness of the rule. Davies v. Humphreys, 6 Mees. & W. 153. See, also, Reg. v. Overseers of Birmingham, 1 Best & S. 763; Livingston v. Arnoux, 56 N. Y. 507, 519; Elsworth v. Muldoon, 15 Abb. Prac. (N. S. N. Y.) 440, 448; Jones v. Howard, 3 Allen (Mass.) 223; Higham v. Ridgway, 10 East, 109, 117; McDonald v. Wesendonck, 30 Misc. Rep. 601, 62 N. Y. Supp. 764.

[195] Massee-Felton Lumber Company v. Sirmans, 122 Ga. 297, 50 S. E. 92

[196] Taylor v. Witham, 3 Ch. Div. 605, 608.

[197] In Taylor v. Witham, 3 Ch. Div. 605, Jessel, M. R., says: "What is the meaning of its being against his interest? I adopt the view of Mr. Baron Parke in the case of Reg. v. Inhabitants of Lower Heyford, 2 Smith, Lead. Cas. (7th Ed.) p. 333, that it must be prima facie against his interest; that is to say, the natural meaning of the

DYING DECLARATIONS—GROUND OF ADMISSIBILITY.

193. The contemplation of impending death is deemed a sufficient guaranty of reliability to render declarations admissible, under the conditions and for the purposes mentioned in the succeeding paragraphs. Such declarations are commonly called "dying declarations."

It has been the theory of the law that a person in the presence of impending death is without further motive to make false statements, and that, earthly considerations having lost to him all significance, his declarations may be absolutely relied upon.[198] While it is doubtless true that, given clear and unclouded faculties, the approach of death exercises a powerful and solemnizing influence on the mind, and prompts a careful regard for truthful statement, yet in some cases passion, hatred, and other feelings of like nature will have their effect, even at the point of death. It must happen, also, not unfrequently, that the inaccuracy of ideas and confusion of mind attendant upon approaching dissolution will color a person's utterances. In spite of these dangers of untruthful or inaccurate statements (dangers which may be greatly lessened by proper care on the part of the court in determining the preliminary question of whether the conditions are such as to render the declarations admissible), it is probably true that the ends of justice are on the whole better served by the admission of this class of declarations than by their exclusion.

entry, standing alone, must be against the interest of the man who made it. Of course, if you can prove aliunde that the man had a particular reason for making it, and that it was for his interest, you may destroy the value of his evidence altogether, but the question of admissibility is not a question of value."

[198] In Rex v. Drummond, Leach, Crown Cas. (4th Ed.) 337, a comparatively early case (1784), the court says, in reference to the admissibility of this class of declarations: "The principle upon which this species of evidence is received is that the mind, impressed with the awful idea of approaching dissolution, acts under a sanction equally powerful with that which it is presumed to feel by a solemn appeal to God upon an oath. The declarations, therefore, of a person dying under such circumstances, are considered as equivalent to the evidence of the living witness upon oath." See, also, Scott v. People, 63 Ill. 508, 510; Hill v. State, 41 Ga. 484, 503.

SAME—EXPECTATION OF IMMEDIATE DEATH.

194. In the use of this sort of evidence, the condition is imperative that declarations be made in contemplation of immediate death, and, if it be shown that the deceased had any hopes of recovery, the declarations are not allowed.

As the condition upon which the reliability of the statements depends is the expectation of immediate death, the courts are strict in seeing that it is always present at the precise time of the making of the statements.[199] If the expectation is present, the condition is satisfied. It is not necessary that the expectation be realized in the actual occurrence of death at the time. Death must occur at some time, but it may be delayed for days, or even weeks, and still not take away from the statements their character as dying declarations.[200] Following the same principle, it is held that statements made immediately prior to the occurrence of death, though in fact dying declarations in the literal sense, are not within the class of dying declarations admitted in evidence if the person did not know that he was about to die when he made the statements.[201]

[199] Com. v. Roberts, 108 Mass. 296; Morgan v. State, 31 Ind. 193; Bull v. Com., 14 Grat. (Va.) 613, 620; State v. Simon, 50 Mo. 370; Lewis v. State, 9 Smedes & M. (Miss.) 115; People v. Taylor, 59 Cal. 640, 646. See, also, dissenting opinion of Judge Harrington, State v. Cornish, 5 Har. (Del.) 502.

[200] People v. Grunzig, 1 Parker, Cr. R. (N. Y.) 299; State v. Cornish, 5 Har. (Del.) 502; Hall v. Com., 89 Va. 171, 175, 15 S. E. 517; Baxter v. State, 15 Lea (Tenn.) 657; State v. Wilson, 121 Mo. 434, 442, 26 S. W. 357; State v. Daniel, 31 La. Ann. 91. In Com. v. Haney, 127 Mass. 455, on the trial of X. for manslaughter, the declarations of the deceased, made four days before his death, were held admissible. Ames, J., refers to Com. v. Cooper, 5 Allen (Mass.) 495, 81 Am. Dec. 762, and Com. v. Roberts, 108 Mass. 296, where death did not occur until about 17 days after. He says: "The rule as to the admissibility of dying declarations does not require that they should have been made while the sufferer is literally breathing his last. It is enough that they were made when he understands that his injuries are fatal and believes his death to be near at hand. If he believed himself to be in a dying state, it is immaterial that he lived four days after making the declarations."

[201] People v. Perry, 8 Abb. Prac. (N. S. N. Y.) 27; Peak v. State,

SAME—IN WHAT CASES ADMISSIBLE.

195. Dying declarations are admissible only in cases of homicide.

It is rather an arbitrary rule which confines the use of dying declarations to cases of trials for homicide. The rule, nevertheless, exists, and is strictly enforced.[202] If the sole reason for admissibility lies in the reliability resting on the solemnizing influence of approaching death, there would seem to be no reason why the declarations, if material, should not be used in civil as well as criminal cases. Some of the earlier text-writers so interpreted the rule,[203] but the courts were not disposed to be so liberal, and when the question arose drew the line very strictly as to the use of evidence of this kind, and laid it down that it was receivable in criminal cases only, and of such cases only in those where homicide was charged.[204] In one civil case,

50 N. J. Law, 179, 183, 12 Atl. 701. In People v. Hodgdon, 55 Cal. 72, 36 Am. Rep. 30, the statement offered as a dying declaration was a writing which began: "Dying statement of Mrs. Emma Downs: Believing I am very near death, and realizing that I may not recover, I wish to make this, my dying statement, as to the cause of my death," etc. It was held that this, on its face, showed there was still a slight hope of recovery, and did not satisfy the requirements, though in fact the woman died within an hour after making it.

[202] Waldele v. Railroad Co., 19 Hun (N. Y.) 69; Johnson v. State, 50 Ala. 456; West v. State, 7 Tex. App. 150.

[203] Phil. Ev. (1st Am. Ed.) p. 201; Starkie, Ev. (7th Am. Ed.) p. 22. In Wright v. Littler, 3 Burrows, 1244, the facts were as follows: A. brought an action against X. in ejectment. A. claimed under a will of M. X. claimed under a subsequent instrument, alleged to be a will. The latter was wholly in the handwriting of S., who was a witness to it, and whose wife was the principal beneficiary, and both wills were long in the possession of S., who, during his last illness and about three weeks before his death, pulled the first will out of his bosom, and gave it to B., and said it was the true will of M., and that the subsequent will he had himself forged. Lord Mansfield held the declaration admissible.

[204] Wilson v. Boerem (1818) 15 Johns. (N. Y.) 286. This was a case where A. sued X. on a promissory note drawn by B., payable to X., by him indorsed to C., and by C. indorsed to A. The declaration of C., made about a week before his death, while he was suffering from consumption, and knew he could not live long, was of-

where a deed had been proved by proving the handwriting of a deceased subscribing witness, it was very strongly urged that certain deathbed utterances of the witness, to the effect that the deed was a forgery, should be admitted. It was claimed that it would be equivalent to giving the party the benefit of cross-examination of the subscribing witness. The court, however, refused to admit the evidence.[205] As a matter of fact, the early cases where declarations of this sort were offered were cases involving charges of homicide, and from the doctrine of admissibility adopted in these cases arose the idea that it was a general doctrine applying to all cases; but, when the question was actually raised as to their admissibility in civil cases, the court, not finding any actual precedent, declined to extend the doctrine.[206] How strictly the rule confining the admission of such declarations to cases of homicide is held to, is illustrated by those cases where, though death resulted from the crime charged, the crime itself is not technically homicide. Here dying declarations are not admitted.[207]

BY WHOM MUST HAVE BEEN MADE.

196. Only declarations made by the person whose death is in issue on the trial are admissible.

fered to show that the note was made by B., and indorsed by X. for the accommodation of C., and that C. gave it to A. to discount, but never received anything for it, but A. pledged it to S. for a debt. The court refused to apply the rule of civil cases, and held the evidence was inadmissible. To the same effect are Daily v. Railroad Co., 32 Conn. 356, 87 Am. Dec. 176; Marshall v. Railway Co., 48 Ill. 475, 95 Am. Dec. 561.

[205] Stobart v. Dryden (1836) 1 Mees. & W. 615. A. sued X. on a covenant contained in a deed. The subscribing witness, M., being dead, the execution was proved by proving his handwriting. Evidence was then offered of declarations of M. tending to prove the deed a forgery. Is it admissible? Parke, B., holds that such declarations are neither admissible as tending to disprove the execution on the theory that declarations of the same witness was used to prove the execution, nor on the theory that it was in the nature of cross-examination.

[206] Stobart v. Dryden, 1 Mees. & W. 614.

[207] Railing v. Com., 110 Pa. 100, 106, 1 Atl. 314; State v. Harper, 35 Ohio St. 78, 35 Am. Rep. 596. See State v. Meyer, 65 N. J. Law,

Another restriction on the use of dying declarations is that they are receivable only when, upon the trial for homicide, the death of the party making them is the subject of the charge.[208] If the death of X. be the homicide charged, and the dying declarations of Y. are offered, they will not be received. But this is not carried to the extent of shutting out the declarations of a person killed by the same act or as the result of the same transaction which caused the death of the person whose homicide is the subject of the trial.[209]

237, 47 Atl. 487, 86 Am. St. Rep. 634. Here the dying declarations of a woman were admitted upon the trial of an indictment against the defendant for attempted abortion. In Massachusetts and New York, in cases of this character, dying declarations are admitted under statutory provisions. Pub. St. Mass. 1882, c. 207, § 9; Laws N. Y. 1875, p. 337, c. 352.

[208] In Rex v. Mead (1824) 2 Barn. & C. 605, X. was tried and convicted for perjury in having sworn on a criminal trial that L. had been present and engaged in a smuggling transaction. On a motion for a new trial, the dying declaration of L., who was shot by X. after his conviction, was offered. This declaration, besides detailing the circumstances of the shooting, included statements that he had not been present in the smuggling transaction. Abbott, C. J., says: "Here the dying declaration of Law was for the purpose, not of accusing, but of clearing, himself. It therefore falls, not within the exception on which those decisions proceeded, but within the general rule that evidence of this description is only admissible where the death of the deceased is the subject of the charge, and the circumstances of the death the subject of the dying declaration." In People v. Davis (1874) 56 N. Y. 95, on the trial of X. for procuring abortion on A., who died from the effects of the operation, the declaration of A. was offered and received on the trial. On appeal the court said: "The court also erred in receiving proof of the declarations of the deceased made after she had abandoned all hopes of life. Such evidence is admissible, in cases of homicide, only where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declarations."

[209] Rex v. Baker (1837) 2 Moody & R. 53. On the trial of X. for poisoning A., the dying declaration of M., a servant, who, after A. had eaten a portion of the poisoned cake, and became sick, said she was not afraid of it, and ate the remainder, and died, as to the manner in which she had made the cake, that she had put nothing bad in it, and that X. was present at one end of the table while she was making it, was offered. It was held that although the death of M. was not the subject of inquiry, as it was all a part of one transaction, the declarations were admissible.

TO WHAT DECLARATIONS MUST RELATE.

197. Declarations made in contemplation of death are admissible only when they relate to the cause of death or the circumstances attending the transaction resulting in death.

The declarations must relate to facts directly connected with the transaction resulting in death. Declarations as to other facts prior or subsequent are inadmissible,[210] as well as declarations which state matters of opinion.[211] The declarations need not be an account of all the facts connected with the cause of death. If the statement is complete, in the sense that it comprises all the deceased intended to say, it is admissible.[212] Where the declaration relates in part only to the killing, and yet is of such a nature as to be not sufficiently intelligible, if separated, the entire declaration may properly be admitted; but in such case the jury should be instructed as to the proper use of the declaration as evidence.[213]

SAME—COMPETENCY.

198. Dying declarations are not admissible if from persons who would be incompetent as witnesses if living and present in court.

[210] Hackett v. People, 54 Barb. (N. Y.) 370; State v. Wood, 53 Vt. 560, 563; Jones v. State, 71 Ind. 66, 76; State v. Shelton, 47 N. C. 360, 64 Am. Dec. 587. In State v. Wood, supra, the following declaration was held inadmissible: "Yes; my wife has threatened a hundred times to kill me before. She threatened to kill me before she went away the last time." In Burroughs v. U. S. (Ind. T.) 90 S. W. 8, the deceased's declaration that he had not thrown anything at the train, nor incited anybody to do so, was held admissible, where, on a prosecution of the brakeman for murder, the defense was that he was struck by a stone and that he had shot, without seeing any one and for the purpose of scaring the person who had thrown the stone.

[211] People v. Shaw, 63 N. Y. 36, 40; State v. Williams, 67 N. C. 12; Wroe v. State, 20 Ohio St. 460; Jones v. State, 52 Ark. 345, 12 S. W. 704; People v. Taylor, 59 Cal. 640, 645.

[212] State v. Patterson, 45 Vt. 308, 313, 12 Am. Rep. 200.

[213] State v. Carter, 107 La. 792, 32 South. 183.

If for any reason the deceased person would, if living, be incompetent as a witness, his dying declarations are inadmissible. This has been held in the case of a convict, an atheist, and in the case of very young children.[214] In the case of husband and wife, it is held that the dying declarations of one are admissible against the other under the same circumstances and for the same purposes that the testimony of one would be admissible against the other. The testimony of the wife, if living, would be good against the husband on a trial for a crime of violence against her person; hence her dying declarations, where her death is the subject of the charge against the husband, are admissible.[215] The declarations are equally admissible whether offered on behalf of the prosecution or the accused.[216]

SAME—FORM OF DECLARATION IMMATERIAL.

199. The admissibility of dying declarations is not dependent on their being made in any particular form. They may be oral or written, verified or unverified. There are no formalities to be observed.

The form of the declaration, or the manner in which it is obtained, is immaterial, if it satisfies the other requirements of the rule. It may have been an oral statement or ejaculation made

[214] The court said in Rex v. Drummond, Leach (4th Ed.) 337, where it was sought to give in evidence the declarations of a convict made immediately prior to his execution: "But to examine a witness to the declarations of an attainted convict would be carrying the rule of evidence beyond its possible extent, even if the person were alive; for as an attainted convict he could not have been admitted to give testimony upon oath, and the dying declarations of such a person cannot, consistently with the principles of justice, be considered as better evidence than his testimony on oath would have been if he had been alive." See, also, statement of Eyre, C. B., in Woodcock's Case, Leach (4th Ed.) 500. Rex v. Pike, 3 Car. & P. 598; Reg. v. Perkins, 9 Car. & P. 395.

[215] People v. Green, 1 Denio (N. Y.) 614; Moore v. State, 12 Ala. 764, 46 Am. Dec. 276.

[216] In Moore v. State, 12 Ala. 764, 46 Am. Dec. 276, A. was on trial for the murder of her husband, X. Declarations by X., four days before his death, that A. had inflicted the wounds which subsequently caused his death, are admissible; so, also, are declarations, made

to a casual bystander,[217] a mere formal statement to a physician, relative, or friend,[218] or answers to questions put by such person,[219] a writing signed by the declarant,[220] or an affidavit.[221] It may even be a communication by means of signs.[222] Where it is a written declaration, and the writing has been lost, oral evidence of what the writing contained will be received.[223] In ordinary cases of a written declaration, the writing must be authenticated and proved as any document offered in evidence.[224] Where both written and oral declarations have been made, both may be proved.[225]

SAME—COURT TO DETERMINE ADMISSIBILITY.

200. The question whether the deceased had an expectation of immediate death is for the court to determine.

This is a preliminary question of fact, relating to the admissibility of the evidence, and must be passed upon by the court.[226] It is sometimes difficult to determine whether the de-

several days later, that A. "did not do it." The jury must weigh both declarations together, and determine which is entitled to credence. See, also, State v. Saunders, 14 Or. 300, 304, 12 Pac. 441.

[217] State v. Arnold, 35 N. C. 184; Mockabee v. Com., 78 Ky. 380.

[218] State v. Gray, 55 Kan. 135, 39 Pac. 1050.

[219] State v. Patterson, 45 Vt. 308, 12 Am. Rep. 200.

[220] State v. Kindle, 47 Ohio St. 358, 24 N. E. 485.

[221] Kilgore v. State, 74 Ala. 1.

[222] Com. v. Casey, 11 Cush. (Mass.) 417, 59 Am. Dec. 150.

[223] State v. Tweedy, 11 Iowa, 350.

[224] Com. v. Casey, 11 Cush. (Mass.) 417, 421, 59 Am. Dec. 150; State v. Kindle, 47 Ohio St. 358, 24 N. E. 485; State v. Cameron, 2 Chand. (Wis.) 172; King v. State, 91 Tenn. 617, 650, 20 S. W. 169; Drake v. State, 25 Tex. App. 293, 312, 7 S. W. 868.

[225] People v. Vernon, 35 Cal. 49, 95 Am. Dec. 49; Collier v. State, 20 Ark. 36. In Wilson v. Com., 60 S. W. 400, 22 Ky. Law Rep. 1251, the peculiar case arose of a written declaration made before the deceased had lost hope, which written declaration was subsequently declared to be true by deceased, after she had lost hope. Both written and oral declarations were quite properly held admissible.

[226] People v. Smith, 104 N. Y. 491, 504, 10 N. E. 873, 58 Am. Rep. 537; Com. v. Bishop, 165 Mass. 148, 42 N. E. 560; Donnelly v. State, 26 N. J. Law, 463, 503; State v. Banister, 35 S. C. 290, 14 S. E. 678; State v. Simon, 50 Mo. 370; State v. Elliott, 45 Iowa, 486; Dixon v.

ceased realized that death was about to take place, though death in fact followed closely upon the making of the statement. It has been held that the actual existence of a dying condition, resulting from some violent cause, such as a mortal wound, is sufficient to justify the inference that the deceased was impressed by the approach of death,[227] but the matter seems to be in some uncertainty.[228] It is not necessary that the deceased express by words his knowledge or belief that death is imminent. If it appear, from the circumstances which surround his making of the statement, including what was said by others in his presence, that he supposed he was dying, it is

State, 13 Fla. 636, 640. Contra, Bush v. State, 109 Ga. 120, 34 S. E. 298.

[227] Woodcock's Case, Leach (4th Ed.) 500. X. was on trial for the murder of his wife, A. A. was found in a ditch, badly bruised, and thought to be dead, but was revived, regained consciousness, and before a magistrate, who administered an oath, made and signed a statement which was strongly against the prisoner. A. died within 48 hours after. It did not appear that A. expressed any apprehension or seemed sensible of approaching death. Eyre, C. B., says: "But a difficulty also arises with respect to these declarations; for it has not appeared, and it seems impossible to find out, whether the deceased herself apprehended that she was in such a state of mortality as would inevitably oblige her to soon answer before her Maker for the truth or falsehood of her assertions. * * * Upon the whole of this difficulty, however, my judgment is that inasmuch as she was mortally wounded, and was in a condition which rendered almost immediate death inevitable; as she was thought by every person about her to be dying, though it was difficult to get from her particular explanations as to what she thought of herself and her situation,—her declarations, made under these circumstances, ought to be considered by a jury as being made under the impression of approaching dissolution."

[228] Reg. v. Morgan (1875) 14 Cox, Cr. Cas. 337. In this case, Reg. v. Cleary, 2 Fost. & F. 853, is referred to as an authority that it cannot be inferred from the nature of the wound itself that the person knew he was about to die. The facts were as follows: On the trial of X. for murder of A., it appeared that A. and X. were in a tent together; that A. came running out with his throat cut, so that he could not speak; that he wrote something on a paper, and died in 10 minutes after. Was the writing admissible as a dying declaration? Denman and Cockburn, after consideration, said that they would not "like to say that the statement was not admissible, but could not admit it without reserving a case for the court for C. C. R. The pros-

sufficient.[229] In the determination of the question of admissibility, evidence as to the state of mind of deceased at the time he made the declaration is received from the defense as well as prosecution, and on such evidence the court determines the admissibility of the declaration.[230]

MATTERS OF PUBLIC OR GENERAL INTEREST—GENERAL RULE.

201. Matters of public or general interest may be proved by hearsay evidence, consisting either of declarations of deceased persons or of general reputation.

The dangers arising from the use of hearsay testimony are almost entirely absent where public or general matters are concerned. The very fact that they are public—that many people are or can be informed in reference to them—is sufficient to justify the admission of hearsay. Matters of this sort approach in their nature those facts of which the courts take judicial notice, and have somewhat the same character with regard to the necessity of the usual formalities of proof. Concerning what is of public interest no one is likely to falsify, for the reason that the public nature of the matter makes false statements too likely to be found out.[231] The exception

ecution proceeded without the statement." There was, therefore, no decision of the point.

[229] Kilpatrick v. Com., 31 Pa. 198; Hill v. State, 41 Ga. 484; People v. Simpson, 48 Mich. 474, 12 N. W. 662; Miller v. State, 27 Tex. App. 63, 10 S. W. 445; Dunn v. State, 2 Pike (Ark.) 229, 35 Am. Dec. 54; People v. Gray, 61 Cal. 164, 175, 44 Am. Rep. 549. The fact of the administration of the last rites of the church by a priest has been held to be proper to prove a knowledge of impending death. State v. Swift, 57 Conn. 496, 505, 18 Atl. 664.

[230] State v. Elliott, 45 Iowa, 486, 488.

[231] Reg. v. Inhabitants of Bedfordshire, 4 El. & Bl. 535. In this case Lord Campbell, C. J., says, concerning the principles governing the admission of this class of declarations: "The admissibility of declarations of deceased persons in such cases is sanctioned because these rights and liabilities are generally of ancient and obscure origin, and may be acted upon only at distant intervals of time; because direct proof of their existence, therefore, ought not to be required; because, in local matters, in which the community are interested, all

to the hearsay rule admitting declarations of this sort is well established both in this country and in England.[282]

The subject of proof by declarations of this sort must be the public matter itself, and not some particular fact which is evidence of the public matter. Thus, if the question be as to the location of a public boundary, declarations and reputation would be admissible to show that the boundary was at a certain place, but would not be admissible to show that a certain surveyor in making a survey had located a corner at a particular place.[283]

SAME—DISTINCTION BETWEEN PUBLIC INTEREST AND GENERAL INTEREST.

202. A right or custom is public if it is common to an entire people, while it is general if it is common to a single community, or to a considerable number of persons forming a party of the community.

203. Declarations as to public matters, by whomsoever made, are admissible.

204. Declarations as to general matters are admitted only when means of knowledge on the part of the person making them is shown.

Some difficulty is met with in determining what matters are of public or general interest. The definition given above

persons living in the neighborhood are likely to be conversant; because, common rights and liabilities being naturally talked of in public, what is dropped in conversation respecting them may be presumed to be true; because conflicting interests would lead to contradiction from others if the statements were false; and thus a trustworthy reputation may arise from the concurrence of many parties unconnected with each other, who are all interested in investigating the subject."

[282] Drury v. Railroad Co., 127 Mass. 571, 581; Borough of Birmingham v. Anderson, 40 Pa. 506, 514; People v. Velarde, 59 Cal. 457; McCall v. U. S., 1 Dak. 320, 46 N. W. 608; Cox v. State, 41 Tex. 1; Weeks v. Sparke, 1 Maule & S. 679; Reed v. Jackson, 1 East, 355.

[283] Ellicott v. Pearl, 10 Pet. (U. S.) 412, 437, 9 L. Ed. 475, Judge Story in this case says that to render evidence of this sort admissible, "three things must generally concur: First, that the fact to which the reputation or tradition applies must be of a public nature; secondly, if the reputation or tradition relate to the exer-

is that usually accepted.[284] In the application of the rule, however, much must depend upon the facts of each particular case.

Questions of public boundaries are the most common instances which arise under the rule, as matters of public interest. By public boundaries are meant boundaries between different political divisions of a country, or boundaries of the country itself. Questions of public rights of way or prescriptive rights are of the same class.[285] In one case the question arose as to the obligation of a certain landowner to repair a bridge on the highway, and it was held to involve a question of public, or, at all events, general, interest, upon which evidence of reputation was admissible.[286]

The question whether certain persons named as trustees of a city in a deed were the legal trustees has been held to be a matter of public interest, and evidence that they were commonly reputed to be the trustees held admissible.[287] A question of the incorporation of a parish is of the same char-

cise of a right or privilege, it must be supported by acts of enjoyment or privilege within the period of living memory; thirdly, that it must not be reputation or traditionary declarations to a particular fact." See, to same effect, Southwest School Dist. of Bolton v. Williams, 48 Conn. 504; Hall v. Mayo, 97 Mass. 416; Dawson v. Town of Orange, 78 Conn. 96, 61 Atl. 101.

[284] Steph. Dig. Ev. art. 30; 1 Greenl. Ev. (15th Ed.) § 128.

[285] In Drury v. Railroad Co., 127 Mass. 571, the question was as to the location of a creek or arm of the sea which had been filled up.

[286] Reg. v. Inhabitants of Bedfordshire, 4 El. & Bl. 535. In this case evidence was offered of a statement of a person who had worked on the bridge, to the effect that he had worked for the private person charged with the repair of the bridge. In one aspect the question was certainly one of public interest, as, if it were held that the private person was not responsible for the repair, necessarily the expense would fall upon the entire parish. It was held accordingly in this case that the statement referred to was admissible in its negative aspect. Where the question was as to which of two towns should be charged with the support of a pauper, and it appeared that the house of the pauper's grandfather stood on the boundary line between the two towns, it became important to show exactly how it stood. Here was a question where the boundary line was not in question, but the situation of the house with respect to the boundary line. It was held that the question was one of general interest. Hall v. Mayo, 97 Mass. 418.

[287] City of Monterey v. Jacks, 139 Cal. 542, 73 Pac. 436.

acter.[238] The admissibility of hearsay respecting these matters has never been questioned.[239] It is when we approach questions of private or semi-private boundaries that we find more uncertainty in the cases. Public boundaries are matters of public interest. Private boundaries may or may not be matters of general interest. In England the questions of manor boundaries and manor rights arose frequently, and it was held that they were matters of general interest where they affected all the tenants of a manor. Hearsay was accordingly allowed. The English courts declined to extend the doctrine further and include questions of private boundary.[240] In America there were no manors, but there was the ownership of large tracts, and the division and subdivision of them until a single original boundary became of common interest to many people. Under these circumstances, the courts showed an inclination to extend the exception to questions of private boundary, and in many of the states it has been so extended.[241]

[238] Dillingham v. Snow, 5 Mass. 547.

[239] Thayer, Cas. Ev. (2d Ed.) p. 418, note.

[240] Doe v. Thomas, 14 East, 323, and note, p. 327. See, also, Earl of Dunraven v. Llewellyn, 15 Q. B. 791, 809.

[241] Holmes v. Turner's Falls Co., 150 Mass. 535, 544, 23 N. E. 305, 6 L. R. A. 283; Royal v. Chandler, 83 Me. 150, 21 Atl. 842; Smith v. Forrest, 49 N. H. 230; Lawrence v. Tennant, 64 N. H. 532, 15 Atl. 543; Child v. Kingsbury, 46 Vt. 47, 54; Kinney v. Farnsworth, 17 Conn. 355; McCausland v. Fleming, 63 Pa. 36; Fry v. Stowers, 92 Va. 13, 22 S. E. 500; Scoggin v. Dalrymple, 52 N. C. 46; Smith v. Nowells, 2 Litt. (Ky.) 159; Clark v. Hills, 67 Tex. 141, 152, 2 S. W. 356; Morton v. Folger, 15 Cal. 275. See, also, Curtis v. Aaronson, 49 N. J. Law, 68, 7 Atl. 886, 60 Am. Rep. 584; Detweiler v. City of Toledo, 13 Ohio Cir. Ct. R. 572. In examining the cases cited it will be noticed that the courts in the different states have dealt with the question differently. In some the exception has been extended much further than in others. In Massachusetts and New Jersey the disposition has been to confine it to declarations made under certain prescribed conditions, namely, by owners of the property while engaged in pointing out their boundaries. In the case of Morton v. Folger, 15 Cal. 275, the facts were as follows: A. v. X. In ejectment to recover certain lands, part of a large tract, concerning other parts of which A. had previously brought suits against other persons. On the trial of the previous suits, A. had introduced as a witness a certain surveyor, who testified as to boundaries. The same boundaries becoming material on the trial of the case with X., and the surveyor

With respect to matters of private concern, other than boundaries, and in no wise affecting the public at large or any single community, the rule is uniform that hearsay will

being dead, A. offers his previous testimony. Held, that it was admissible. In reference to the American doctrine the court say: "It is not necessary however, according to the authorities in the majority of the American states, that the hearsay, to entitle it to be received, should be general, or relate to boundaries in which the public or numerous persons are interested. It may be limited to particular facts embracing the declarations of a single individual, provided such individual had, from his situation, the means of knowledge, and was disinterested in the matter and may relate only to the boundary of a private estate." In Detweiler v. City of Toledo, above cited, the testimony allowed consisted of the field notes of a surveyor, showing the true boundary lines; the surveyor being dead. Where the declaration of a surveyor contradicts the evidence left by him in his official act and survey, as where he stated that a tree marked as a monument by him was in fact not the correct monument, the declaration will not be received. Ellison v. Branstrator, 153 Ind. 146, 54 N. E. 433. In Harriman v. Brown, 8 Leigh (Va.) 697, we find the following (pages 709, 710): "Because we have not manors, shall we therefore lose the benefit of the rule which considers boundary as matter of reputation, and permits hearsay evidence of its locality? If a like state of things exists among us, if the principle will be found to apply in its utmost strictness, shall we reject the evidence because the case is not identical? By no means. * * * If reputation is admissible to establish the boundaries of a manor, because all the tenants of the manor are interested therein, and are naturally conversant about the boundary, and may be presumed to discourse together about it, what shall we say in the case of our wild lands, which were covered with early adventurers, whose chief concern was to make themselves acquainted with the lines and corners of all around them? Every one who knows anything of the history of that country must know the deep interest and familiar knowledge which the early settlers possessed in relation to the corners and boundaries and localities, not only of their own particular tract, but of almost every tract within range of their settlement. Every one knows that such subjects were not only the familiar topics of conversation, but that they were the all-absorbing topics. I will venture to conjecture that, for one discussion in private conversation as to the boundaries of an English manor, there have been a hundred animated and interested debates about the situation of a corner tree in our western counties. I take it, therefore, that every motive for the admission of hearsay testimony as to boundary in case of a manor applies with equal force to its admission in questions of boundary with us." In Wooster v. Butler, 13 Conn. 309, 315, the fact proved by hearsay evidence was a fact of general interest—evidentiary, however, of a

not be allowed.[242] Nor will declarations or reputation be received to prove particular facts from which the location of private boundaries may be inferred. In those jurisdictions where the exception is extended to include proof of private boundaries, this limitation is observed in the same manner as in respect to public matters.[243] There seems to be no distinction between cases where the question of public interest is a main fact in issue, and cases where it is merely evidentiary. In both, hearsay is admitted.[244]

Where the matter is one of public interest, declarations made by any one since deceased are admissible. Every person is a member of the public, and as such his declarations are as good as those of any other person. It is not a question here of qualification.[245] In respect to matters of general interest, the fact that the person whose declarations are offered was a member of the community interested must be

question of private boundary. The evidence allowed was the testimony of two aged men that when they were young they had heard old men, since deceased, say that there was a traveled road or highway over a certain piece of land. The location of the highway was a fact tending to show the location of the private boundary claimed by the plaintiff. The court, however, lay it down flatly that the doctrine has been extended "to prove the boundaries of lands between individual proprietors."

[242] Peck v. Clark, 142 Mass. 436, 440, 8 N. E. 335; Roe v. Strong, 107 N. Y. 350, 14 N. E. 294. In Inhabitants of Abington v. Inhabitants of North Bridgewater, 23 Pick. (Mass.) 170, 174, the question arose as to the residence of a pauper—whether in the one town or the other. The question reduced itself, by the peculiar circumstances of the case, to the question of the exact location of a house which was on or very near the boundary line between the two towns. To show its location, declarations of deceased persons familiar with the locality were offered. It was held that they were admissible, and the question was analogous to a question of boundary,—a conclusion scarcely justified by the facts, since in no sense was the boundary in issue, either as a main fact or an evidentiary one. A later case in Massachusetts, without referring in any way to Inhabitants of Abington v. Inhabitants of North Bridgewater, seems to reach an opposite conclusion. Hall v. Mayo, 97 Mass. 416.

[243] Wendell v. Abbott, 45 N. H. 349; Fraser v. Hunter, 5 Cranch, C. C. (U. S.) 470, Fed. Cas. No. 5,063.

[244] In Wooster v. Butler, 13 Conn. 309, 315, the public matter in question was evidentiary.

[245] Drury v. Railroad Co., 127 Mass. 571, 581.

shown before the declarations can be admitted.[246] It is generally held in the jurisdictions where the declarations are received on questions of private boundary that it must appear that the declarant was in a position to know about the subject, and that when the declaration was made it was in connection with the pointing out of the boundaries.[247]

SAME—TWO KINDS OF HEARSAY ADMISSIBLE.

205. Specific declarations and general reputation are both admissible upon matters of public or general interest.

If it be settled that a matter in question is a matter of public or of general interest, it is universally held that both general reputation and declarations of deceased persons will be received. As to public boundaries, the admission of general reputation was an early practice of the courts,[248] and its extension to specific declarations may have been a natural development. With respect to private boundaries, as already explained, the law followed a different course in this country from that which became established in England, and it went to the full length of allowing both general reputation and specific declarations as proof.[249] Where specific declarations are offered, it must clearly appear that the declarant is dead, before they will be received.[250] And it has been held that, if the

[246] McKinnon v. Bliss, 21 N. Y. 206, 218. In McKinnon v. Bliss, supra, the question at issue was the existence of a royal grant to certain land, covering several towns, and occupied by many people. It did not appear that any of the inhabitants occupied their lands, or claimed to, by virtue of title derived under this grant. It was accordingly held that reputation among them that the letters patent had during the Revolution been buried in the ground, and thus been lost, was inadmissible.

[247] Hunnicutt v. Peyton, 102 U. S. 333, 360, 26 L. Ed. 113; Holmes v. Turner's Falls Co., 150 Mass. 535, 544, 23 N. E. 305, 6 L. R. A. 283; Long v. Colton, 116 Mass. 414; Bethea v. Byrd, 95 N. C. 309, 59 Am. Rep. 240; Martyn v. Curtis, 68 Vt. 397, 35 Atl. 333; High's Heirs v. Pancake, 42 W. Va. 602, 26 S. E. 536.

[248] See cases referred to in Thayer, Cas. Ev. (2d Ed.) p. 418, note.

[249] Cases cited in note 241, ante, p. 336.

[250] Flagg v. Mason, 8 Gray (Mass.) 556; Buchanan v. Moore, 10 Serg. & R. (Pa.) 275; Smith v. Cornett, 38 S. W. 689, 18 Ky. Law Rep. 818.

declaration did not relate specifically to the particular land in dispute, it would be excluded; that is, a general statement, which by implication includes the land about which question is raised, would not be considered of sufficient importance to justify its admission.[251] The usual requirement in regard to statements introduced in evidence being made prior to the existence of the controversy in which they are sought to be used applies here. This is a matter which is held to have so important a bearing upon their credibility that it is a necessary condition to their use.[252]

PUBLIC DOCUMENTS AND BOOKS.

206. Books and documents of a public nature, in which are recorded facts to be preserved for public reference, are admissible.

There are many instances where records are kept by persons occupying public office, or engaged in occupations of a public nature. These records, though somewhat similar in kind to those of which the court may take judicial notice, do not usually have a sufficient degree of publicity to bring them within the limits of that class of matters. They are, however, deemed to have sufficient guaranty of reliability to render them admissible if offered in evidence. The fact that they are kept for reference by a person having no interest to falsify them, and that, if untrue, they would be readily discovered and

[251] Dawson v. Town of Orange, 78 Conn. 96, 61 Atl. 101. In a recent case the requirement respecting death of the declarant has been stated in a broader form; the admissibility having been said to extend to deceased person or persons supposed to be dead, or unavailable as witnesses. City of Hartford v. Maslen, 76 Conn. 599, 57 Atl. 740. In this case an article in a newspaper was offered to show a general public understanding as to the purpose for which certain land had been purchased by a city. It was held inadmissible. It did not appear that the author had any particular knowledge on the subject, or that he was unavailable as a witness.

[252] Richards v. Bassett, 10 Barn. & C. 657, per Littledale, J., at page 663. But it has been held that, if the declarations made after suit brought are shown to be repetitions of similar declarations made before, the principle excluding them does not apply. Coate v. Speer, 3 McCord (S. C.) 227, 15 Am. Dec. 627.

corrected, makes them worthy of credence. The element of duty also enters into the case. Usually the person keeping the records is under some obligation, official or otherwise, to keep them; and this brings them close to those entries in account books which are admitted because made, in the regular course of business, pursuant to a duty. The application of this exception to the hearsay rule in the early cases caused the admission of acknowledgments of deeds made before a court of record, enrollments of deeds, fines and recoveries, and many records of similar nature.[253] The admission of records of births, deaths, and marriages kept by the civil authorities pursuant to statute, or even by religious orders according to custom; of records of the weather bureau as to the condition of the weather; of the post-office department as to registered letters—are more modern examples of the application of the same principle.[254] It is a necessary condition to the admissibility of a public record or document that it shall have been intended to be open to public inspection. The mere fact that the record is made by a public officer, even though he be acting pursuant to duty, does not make it one intended to be public. A confidential report will therefore be excluded.[255]

[253] Smartle v. Williams, 1 Salk. 280; Lynch v. Clerke, 3 Salk. 154. See Thayer, Cas. Ev. (2d Ed.) pp. 428, 429, where the above and other cases are referred to.

[254] Kennedy v. Doyle, 10 Allen (Mass.) 161; Pells v. Webquish, 129 Mass. 469; Gurney v. Howe, 9 Gray (Mass.) 404, 69 Am. Dec. 299; Evanston v. Gunn, 99 U. S. 660, 25 L. Ed. 306; Anderson v. Hilker, 38 Wash. 632, 80 Pac. 848. It has been held that records of the weather made by a railroad agent and his clerks, and not preserved under any requirement of law or rule of the railroad company, are inadmissible. Monarch Mfg. Co. v. Railroad Co., 127 Iowa, 511, 103 N. W. 493.

[255] Sturla v. Freccia, 43 Law T. (N. S.) 209. Lord Blackburn in this case discusses very fully the elements which are necessary to make a document public, within the meaning of this exception. He says (page 214): "What a public document is, within that rule is, of course, the great point which we have now to consider. * * * I do not think that 'public' is to be taken there as meaning the whole world. I think an entry in the books of a manor is public, in the sense that it concerns all the people interested in the manor; and an entry in a corporation book concerning a corporation matter, or something in which all the corporation is concerned, would be public, within that sense. But it must be a public document, and it must be made

Declarations of this class are frequently confused with matters which are properly the subject of judicial notice.[256] The one class shades into the other, but at the extremes they are entirely distinct.

The statutory provisions have quite generally supplemented the common-law rules respecting the admission of this class of evidence, and it will be well to consult the statute in any jurisdiction in which the question may arise.

by a public officer. * * * But I think that the very object of it must be that it should be made for the purpose of being kept public, so that the persons concerned in it may have access to it afterwards." Some instances of the more liberal application of this exception are as follows: A coroner's verdict on the question as to the cause of death. Knights Templars' & Masons' Life Indemnity Co. v. Crayton, 209 Ill. 550, 70 N. E. 1066. Life tables. Knott v. Peterson, 125 Iowa, 404, 101 N. W. 173; Bouvier's Law Dictionary as to the meaning of the word "adult" under the civil law; Banco De Sonora v. Casualty Co., 124 Iowa, 576, 100 N. W. 532, 104 Am. St. Rep. 367. Record of the speed of a horse, published by a trotting association in a register generally accepted as official. Pittsburgh, C., C. & St. L. Ry. Co. v. Sheppard, 56 Ohio St. 68, 46 N. E. 61, 60 Am. St. Rep. 732. Ship's papers, executed by the authorities of a foreign government. Grace v. Browne, 86 Fed. 155, 29 C. C. A. 621. Pedigree record of dogs. Citizens' Rapid Transit Co. v. Dew, 100 Tenn. 317, 45 S. W. 790, 40 L. R. A. 518, 66 Am. St. Rep. 754. Code of Rules of the Master Car Builders' Association. Union Stockyards Co. v. Goodwin, 57 Neb. 138, 77 N. W. 357. Records and official papers of the Confederate Government. Oakes v. U. S., 174 U. S. 778, 19 Sup. Ct. 864, 43 L. Ed. 1169. Historical writings relating to Indian tribes, their governments, laws, and customs. Onondaga Nation v. Thacher (Sup.) 61 N. Y. Supp. 1027. A tax roll. Smith v. Scully, 66 Kan. 139, 71 Pac. 249. Some of the matters which have been held inadmissible, under a stricter interpretation of the exception, are: Medical works on the subject of effect of physical injuries. Union Pac. Ry. v. Yates, 79 Fed. 584, 25 C. C. A. 103, 40 L. R. A. 533. A surveyor's report made to the court. Helton v. Asher, 103 Ky. 730, 46 S. W. 222, 82 Am. St. Rep. 601. A city directory, giving the directors and officers of corporations. Tichenor v. Newman, 186 Ill. 264, 57 N. E. 826. A copy of board of health record, upon the question of the cause of death of a person. Beglin v. Insurance Co., 173 N. Y. 374, 66 N. E. 102. A private catalogue of horses. Louisville & N. R. Co. v. Frazee, 71 S. W. 437, 24 Ky. Law Rep. 1273.

[256] Steph. Dig. Ev. arts. 33–35.

rounding circumstances may be proved in evidence as a part of the thing done (res gesta).[259] So long as these circumstances do not consist of declarations and statements, they are introduced as a matter of course, proved by either side without question, unless, indeed, they get too far away from the main fact, when, under rules having no relation to the subject of hearsay, they are excluded.[260]

It is when they comprise statements, exclamations, answers to questions, and other verbal utterances by the participants in the act or event, that they occupy the attention of the courts. If it had been possible to treat verbal utterances made under such conditions purely as acts, and not in any sense as evidence of the things stated, the subject of res gestæ would not have belonged under the head of exceptions to the hearsay rule. But declarations of this sort were urged upon the courts most strongly when they were wanted and needed as evidence of the facts to which they referred, and the courts received them as such evidence, and thus created another exception to the rule against hearsay.[261] The ground of reliability upon which such declarations are received is their spontaneity. They are the extempore utterances of the mind under circumstances and at times when there has been no sufficient opportunity to plan false or misleading statements; they exhibit the mind's impressions of immediate events, and are not narrative of past happenings; they are uttered while the mind is under the influence of the activity of the surroundings.

[259] Steph. Dig. Ev. art. 3. Boyd v. Railroad Co., 112 Ill. App. 50.

[260] They may, for example, get into the class of "too remote matters." See ante, p. 167.

[261] Insurance Co. v. Mosley, 8 Wall. (U. S.) 397, 19 L. Ed. 437; Waldele v. New York Cent. & H. R. R., 95 N. Y. 274, 47 Am. Rep. 41; Earle v. Earle, 11 Allen (Mass.) 1; Rex v. Foster, 6 Car. & P. 325; Christopherson v. Railroad Co. (Iowa) 109 N. W. 1077; Horst v. Lewis (Neb.) 103 N. W. 460. In Lander v. People, 104 Ill. 248, the fact of which the declaration was a part was the recognition of the prisoner by the witness on the day after the perpetration of the crime. This was collateral to the main fact in issue, to wit, whether the prisoner was the person who committed the crime. An exclamation by the witness to a companion, who was also a witness, as follows: "There goes the man," with the companion's reply, "Yes, there he goes," was held properly admitted as part of the res gestæ.

As a good illustration we have the cases of statements made by persons injured, or others in their presence at the time of the injury.[262] Taken altogether, it is perhaps safe to say that in the case of no exception to the hearsay rule is there as little danger and as much assistance to the cause of justice as in this, taking into consideration the manner in which it has been applied.[263]

SAME—MUST BE CONTEMPORANEOUS.

209. Declarations of this sort, to be admissible, must be made while the act is being done or the event is happening, or so soon thereafter that the mind of the declarant is actively influenced by it.

The conflict in the decisions arises mainly in regard to the extent of time which the res gestæ is held to cover; and when it is considered that each case where a declaration of this sort

[262] Hutchels v. Railroad Co., 128 Iowa, 279, 103 N. W. 779. Here the plaintiff fell from a street car, by reason of negligence in failure to let down a folding step. As she fell she exclaimed, "Yes, let down the step after I fall!" The declaration was a typical instance of res gestæ. It was clearly admissible, both as a part of the transaction, and, having been received, as evidence also that the step was not let down until after the plaintiff fell. In this case the statement was spontaneous and coincident with the event. Declarations admissible under this exception are not always so near in point of time to the fact which is the subject of proof. For example, in Rothrock v. City of Cedar Rapids, 128 Iowa, 252, 103 N. W. 475, the declarations, which referred to the manner and place in which plaintiff had sustained injuries, but were made on her arrival home, within half an hour after the occurrence, were held admissible, it appearing that she was still suffering from the injuries and had the marks upon her. But where the declarations were made over a mile from the place of the accident, and an hour afterwards, and were not spontaneous, but elicited by questions, it was held that they are not admissible. White v. City of Marquette, 140 Mich. 310, 103 N. W. 698. The action of other passengers at the time of the accident has been held to be admissible as part of the res gestæ. Chretien v. Railroad Co., 113 La. 761, 37 South. 716, 104 Am. St. Rep. 519.

[263] It has been said that the modern tendency is to extend, rather than to narrow, this exception to the hearsay rule, and to consider the grounds which formerly excluded such declaration as affecting their weight. Jack v. Life Ass'n, 113 Fed. 49, 51 C. C. A. 36.

is offered is an independent case, to be treated upon its own facts, always, however, with the general principle of admissibility in mind, it will be seen that a harmonious classification of the cases is impossible.[264] There is a point at which a statement by a participant in an act becomes a mere narrative of a past occurrence, and when that point is reached his declaration is inadmissible.[265] It has been held that declarations made thirty minutes after the happening of an accident are narrative, and inadmissible.[266] When the declarations are held admissible, they are generally at the time of or within a few moments of the event to which they relate.[267]

Where A. was the assignee of a life insurance policy upon the life of B., and brought action against the company, evidence was offered by the company of declarations made by B., after the assignment of the policy to A., tending to show an intention to commit suicide. Having been made some time before the death of B., they were held to be inadmissible, and not a part of the res gestæ.[268] But in Wood v. State, 92 Ind. 269, declarations made half an hour before the act in question were held admissible, for the reason that they were part of a continuous quarrel or altercation.[269]

Sometimes the declarations are contemporaneous with some evidentiary fact or condition. In an action for personal injuries, upon the question of damages, the plaintiff's suffering and pain is material. It is held that exclamations and state-

[264] See opinion of Fletcher, J., in Lund v. Inhabitants of Tyngsborough, 9 Cush. (Mass.) 36, 42.

[265] Rockwell v. Taylor, 41 Conn. 55, 59.

[266] Vicksburg & M. R. Co. v. O'Brien, 119 U. S. 99, 103, 7 Sup. Ct. 118, 30 L. Ed. 299; White v. Railway Co., 123 Ga. 353, 51 S. E. 411, where the time was an hour. A declaration made ten minutes after the accident has been held inadmissible. The Saranac (D. C.) 132 Fed. 936. Also a declaration made "several minutes" after the accident. Hot Springs St. R. Co. v. Hildreth (Ark.) 82 S. W. 245; See, also, South Covington & C. St. R. Co. v. Riegler, 82 S. W. 382, 26 Ky. Law Rep. 666.

[267] See cases cited under note 261, p. 344, supra; Pool v. Warren County, 123 Ga. 205, 51 S. E. 328.

[268] Ross-Lewin v. Insurance Co., 20 Colo. App. 262, 78 Pac. 305. But see Kerr v. Modern Woodmen of America, 117 Fed. 593, 54 C. C. A. 655.

[269] Hannabalson v. Sessions, 90 N. W. 93.

ments, showing the existence of such suffering and pain, are admissible, even though same be after the injury.[270]

SAME—CASES NOT BELONGING UNDER THIS HEAD.

210. Declarations of agents concerning the business of their principals, of the injured person in rape cases, and of insolvent persons where their insolvency is under inquiry, are not properly included in this class of declarations.

The subject of res gestæ has been confused by nothing more than by the loose manner in which declarations in certain classes of cases have been treated as declarations which are a part of the res gestæ, and held admissible on that ground. The cases referred to are those of agency, rape, and bankruptcy. The result has been mainly felt in the uncertainty which has arisen regarding the extent of time within which a declaration may be received as part of the res gestæ. When, in a bankruptcy case, a declaration of the bankrupt, made a month after the act of bankruptcy, is held admissible, and the admissibility placed upon the ground that the declaration is a part of the res gestæ, while in an accident case, a declaration, made half an hour after the event, is held not to be near enough in point of time to be admissible, the query suggests itself as to whether there is one construction of the rule for one class of cases and a different one for another. Professor Thayer in his Cases on Evidence has cleared the matter up, and rendered a genuine service to the cause of clear thinking, by taking out cases of agency, rape and bankruptcy from the class of ordinary res gestæ cases.[271] In the agency cases there is ordinarily no question of res gestæ. The question is one of admissions. If the declaration of the agent is receivable, it is to be determined on the principle governing the subject of an agent's power to bind his principal by his statements. If he has power, his statement becomes an admission of the principal. If the circum-

[270] Cashin v. Railroad Co., 185 Mass. 543, 70 N. E. 930; Montgomery St. R. Co. v. Shanks, 139 Ala. 489, 37 South. 166; Indianapolis St. R. Co. v. Schmidt, 163 Ind. 360, 71 N. E. 201.

[271] Thayer, Cas. Ev. (2d Ed.) pp. 641–651.

stances shown are not such as to give him that power, his declarations will be excluded.[272] In cases of rape the fact that the complainant reported the commission of the crime has always been admitted as a piece of circumstantial evidence in corroboration of her testimony, and rather for the protection of the accused than otherwise; it being considered a suspicious circumstance if the complainant could not show that immediately after the alleged act she reported and complained of it. From this rule grew the practice in certain states of receiving

[272] In U. S. v. Gooding, 12 Wheat. (U. S.) 460, 6 L. Ed. 693, declarations of an agent were admitted as a part of the res gestæ, though in discussing their admissibility the court treated the question as one of authority on the part of the agent to bind his principal. See opinion of Story, p. 470 of 12 Wheat., 6 L. Ed. 693. See, also, White v. Miller, 71 N. Y. 118, 134, 27 Am. Rep. 13, in which Andrews, J., in discussing the admissibility of declarations of an agent, says (page 135 of 71 N. Y. [27 Am. Rep. 13]): "The general rule is that what one person says out of court is not admissible to charge or bind another. The exception is in cases of agency; and in cases of agency the declarations of an agent are not competent to charge the principal upon proof merely that the relation of principal and agent existed when the declarations were made. It must further appear that the agent, at the time the declarations were made, was engaged in executing the authority conferred upon him, and that the declarations related to and were connected with the business then depending, so that they constituted a part of the res gestæ." The question is treated on the res gestæ basis in Adams v. Hannibal & St. J. R. Co., 74 Mo. 553, 556, 41 Am. Rep. 333; Glisson v. Light Co., 87 S. W. 305, 27 Ky. Law Rep. 965; Beckwith v. Mace, 140 Mich. 157, 103 N. W. 559; Bigley v. Williams, 80 Pa. 107, 116; Northern Pac. R. Co. v. Kempton, 138 Fed. 992, 71 C. C. A. 246. In the latter case, upon the question of the responsibility for delay in transporting cattle, the conductor's statement, in answer to a question, "Why don't you get over the road?" "I can't get anywhere with this dummy. They should have known better than to have sent it out this kind of weather"—was held to be admissible, as a part of the res gestæ, although it seems to rest more clearly on the ground of the admission of an agent relating to the business in which he was engaged for his principal.

But it has been held that the conductor's statement as to the condition or operation of the road, made after the completion of his duties, in connection with the matter in question, is not admissible. Seaboard Air Line Ry. v. Hubbard, 142 Ala. 546, 38 South. 750. See, also, Dorry v. Railroad Co., 104 App. Div. 309, 93 N. Y. Supp. 637. A proper conception of the matter is found in the opinion of Sir William Grant in Fairlie v. Hastings, 10 Ves. 123, 127.

not only the fact of the complaint, but also the full details of the statement made, on the erroneous ground that it was a part of the res gestæ.[273] It was seldom the case that the declarations were a part of the res gestæ, and the substance of them should not, on this principle at least, have been admitted. The fact of their having been made was a piece of circumstantial evidence corroboratory of the complainant's direct testimony, and on this ground such fact was admissible. In most jurisdictions this is the extent to which the courts have gone, though they have sometimes spoken of the declarations even in this aspect as part of the res gestæ.[274] In insolvency cases the subject of motive is under inquiry, and the necessity of introducing declarations of the insolvent as evidence of motive or intent was so strong that the courts again resorted to the doctrine of res gestæ, and stretched the time limit to adapt it to any cases where it seemed just to receive the declarations.[275] What was lost sight of was that in proving intent or motive, declarations are generally in the nature of original evidence, and not hearsay.[276]

[273] State v. Kinney, 44 Conn. 153, 26 Am. Rep. 436; Burt v. State, 23 Ohio St. 394. In Hornbeck v. State, 35 Ohio St. 277, 35 Am. Rep. 608, the rule was declared that the declarations were receivable where the complainant herself testified, but they were excluded in that particular case on account of the incompetency of the complainant as a witness, she being an imbecile. To the same effect is State v. Meyers, 46 Neb. 152, 64 N. W. 697, 37 L. R. A. 423.

[274] Baccio v. People, 41 N. Y. 265; State v. Ivins, 36 N. J. Law, 233; Barnett v. State, 83 Ala. 40, 3 South. 612; McMurrin v. Rigby, 80 Iowa, 322, 45 N. W. 877; People v. Mayes, 66 Cal. 597, 6 Pac. 691, 56 Am. Rep. 126.

[275] See Bedingfield's Case, 15 Am. Law Rev. 15–20; Ridley v. Gyde, 9 Bing. 349 (per Tindal, C. J., page 351); Bateman v. Bailey, 5 Term R. 512; Rawson v. Haigh, 9 Moore, 217, 225.

[276] The case of Chicago & E. I. R. Co. v. Chancellor, 165 Ill. 438, 46 N. E. 269, is an illustration of how the court sometimes goes astray by treating declarations of this character as within the principle of res gestæ. Here the intent of the plaintiff's intestate to become a passenger on defendant's train became material, and declarations made by the intestate about an hour before the train was to leave were offered. They were excluded on the ground that they were not res gestæ, when clearly they should have been admitted as original evidence of intent; the principle of res gestæ having no application.

CHAPTER XII.

WITNESSES.

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229. Self-Incriminating Matters.
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231. How Privilege Claimed.
232. Waiver of Privilege.
233. Remedy in Case of Denial of Privilege.
234. Inference from Exercise of Privilege.
235. Privileged Matter to be Determined by Court.
236. Professional Communications.
237. When Relation of Attorney and Client Exists.
238. What Included in Privileged Matters.
239. Inference from Exercise of Privilege.
240. Consent of Client.

ORIGIN OF RULES EXCLUDING WITNESSES.

211. Rules excluding certain classes of persons as witnesses owe their origin very largely to historical reasons now obsolete.

A considerable portion of the law of evidence must necessarily be concerned with the rules which have gradually grown up in the courts respecting persons who may be witnesses, and the manner in which their testimony may be given. In dealing with this subject, we have to deal with the conditions,

customs, and prejudices of the people among whom the English law has developed. Ideas which no longer have any active force in determining the practice of our courts have nevertheless, in earlier times, executed a powerful influence, and shaped rules which even to this day have survived. It must be remembered that the development of the judicial system which obtains in this country began in a rude way among a rude and half-civilized people; that there has been a constant struggle, both judicially and legislatively, to throw off the narrow, illiberal, and primitive rules which the earlier conditions fixed upon the law. The courts could not be better than the people who established the laws for the enforcement of which the courts existed. They were dominated by the spirit of the times, and, from the difficulty which any well-established judicial system finds in changing the principles upon which it rests and the rules and practice which govern its operation, the courts necessarily lagged behind the people in the growth towards a more liberal and broader civilization. They have been hampered by principles long out of date, by rules which have no adaptation to present conditions; and with that disinclination which has always characterized them, to in any way usurp the legislative functions, they have found it difficult of themselves to break away from the old traditions, usages, and practices. They have had to depend upon the legislative bodies for the necessary changes, and too often it has happened that in the multitude of other interests which have more directly, though not more forcibly, affected the public, legislators have lost sight of their duty in this respect. Nowhere do we see this illustrated more clearly than in the laws respecting the use of witnesses in public tribunals. In the social and political life of earlier times there was a recognized inequality between persons of different political and religious beliefs, as well as between the sexes. It was but natural that, in fixing the standing in court of persons offered as witnesses, regard should have been paid to these matters. The result was rules of exclusion which prevented certain persons from being witnesses at all. These early rules of exclusion may, in their development, have felt the influence of the peculiar relation which persons summoned as witnesses bore to the case. Reference is made to the early practice, un-

der which the witnesses and jurymen were identical. In case of the investigation of a crime, persons were summoned from the neighborhood, who were supposed to be most intelligent and best able to tell about the matter. They thus had a semi-official character, and care was to be used in their selection. This idea was not gotten rid of at once, and its effect was felt long after the entire separation of the jury from the witnesses was an accomplished fact.[1]

PERSONS FORMERLY EXCLUDED AS WITNESSES.

212. The early rules of exclusion prevented the following classes of persons from testifying:

(a) Those who by reason of peculiar religious belief, or lack of any religious belief, were not supposed to be amenable to the binding force of an oath.

(b) Parties to the suit.

(c) The husband or wife of a party to the suit, except where a crime was charged by the husband against the wife, or vice versa.

(d) Persons pecuniarily interested.

(e) Naturally incapacitated persons.

(f) Those guilty of certain crimes.

Speaking generally, the trend of these exclusions was about in the same direction as the present rules excluding persons from acting as jurors, thus giving another illustration of the influence of the old jury system. The substantial disappearance of these rules of exclusion may be traced between the years 1823 and 1853. In this country the disappearance went on more rapidly than in England, due to the fact that the old ideas had less effect upon our courts than in the country where they were native.

INFIDELS AND ATHEISTS.

213. Formerly all persons not Christians were excluded from testifying; but at the present time there is no exclusion upon the ground of religious belief, or the lack of it.

[1] See editorial note in Thayer, Cas. Ev. (2d Ed.) p. 1066.

The theory of the oath has always been that it gave a peculiar sanctity to testimony, and that without the oath there was no guaranty of truthfulness. Under these circumstances (and the law recognized no substitute for the oath), it was quite natural that persons who, by reason of their religious belief, felt no force in the oath, should have been excluded from testifying.[2] In fact, without a change in the theory it would have been inconsistent and absurd to have allowed a person who refused to take an oath, or, if taking it, took it only as a matter of form, to give his testimony. The broadening of the form of the oath, with the recognition that other religious beliefs besides the belief of the established church might exercise the same influence over the mind, and furnish the same guaranty of truthfulness, resulted in the final disappearance of this rule of exclusion. The change came by degrees, however. It was hard for the English courts to break away from the predominant idea of the English people that theirs was the only true religion, and to concede that other forms of worship might exercise a solemnizing influence on the mind of equal force. But the change finally came about, and to-day little is left of the old rule.[3] In the case of the sect of Quakers, so obnoxious to the early English churchmen,

[2] Butts v. Swartwood, 2 Cow. (N. Y.) 431; Blair v. Seaver, 26 Pa. 274; Clinton v. State, 33 Ohio St. 27, 32.

[3] In 7 Coke, 17b, it is laid down that infidels—and by this he means all persons not Christians (see opinion of Lord Chief Justice Willes in Omychund v. Barker, 1 Atk. 21, 43)—have no standing in the English courts; but this doctrine was exploded as early as 1739, when it was held in the case of Omychund v. Barker that the testimony of three witnesses whose depositions had been taken under oath administered in accordance with the Gentoo religion should be received. Lord Chief Justice Willes there says (page 45): "There is nothing in the argument that, as Christianity is the law of England, no other oath is consistent with it; and, for the reasons already given, this argument carries no weight with it. Though I have shown that an infidel cannot be excluded from being a witness, and though I am of opinion that infidels who believe in a God, and future rewards and punishments in the other world, may be witnesses, yet I am as clearly of opinion that if they do not believe in a God, or future rewards and punishments, they ought not to be admitted as witnesses." It is evident from this that at that time the courts had found no way to admit the testimony of atheists.

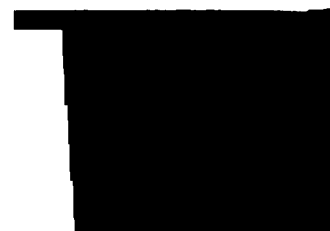
ɔd to take the oath, some little difficulty inging them within the rule of compe-t, that a special statute was required to 'ege.[4] But this did not extend their cases. Later, however, all restriction m of affirmation established for any not desiring to take the oath.[5] In provisions abolishing incompetency ıion or the lack of it are quite gen-

wear the witness under that oath ıg to the tenets of his religion or ɔon his conscience.[7] The religious ɔwn, to affect his credibility. It chusetts case that the fact that holic, and therefore might tes-ctation of absolution upon sub-uld be shown for the purpose timony; but the court refused hese matters, and held there eliefs, which the law recog-wever, is not the prevailing

ed Quakers to affirm where e oath.

gious qualification was final-ion (Const. 1847, art. 1, § rendered incompetent to be ıatters of religious belief." . W. 704. This was trial ɜ placed on the stand and l it was error, and the which was to have wit-ɐar by it. Jewish oath: Bow v. People, 160 Ill. ɔrror for the witnesses oath. See, also, State

In reference to this objectionable. You particular doctrine. hich holds that the



doctrine, and it is quite generally held that cross-examination may extend to a witness' religious opinion, and argument be made to the jury as to its effect on his credibility.[9]

The oath may be waived by consent and the testimony will be taken.[10]

PARTIES TO THE SUIT.

214. Parties to the suit may testify in both civil and criminal cases in this country. In England they may testify in civil cases, but accused persons in criminal trials are incompetent as witnesses.

The old rule as to the incompetency of parties to the suit to be witnesses was founded upon the prejudice supposed to exist on account of personal interest in the result. At the present day it has been entirely abolished, except in the one case of an accused person upon trial for the crime charged against him; and this exception only exists in England. In the United States there is no difference made between civil and criminal cases. Parties to either may testify without restriction. There

duration or extent of future punishment will be less than it will be according to the tenets of a different sect, you might argue that his testimony is not entitled to so much confidence as it would be if he belonged to the latter sect. Such course of argument cannot be permitted."

[9] Blair v. Seaver, 26 Pa. 274, where it is said: "It is for the jury to say whether the credibility of the witness is affected by his belief in the extent of the penalty to be incurred by false swearing or his want of belief in the Christian religion; and in Stanbro v. Hopkins, 28 Barb. (N. Y.) 265, it was held that a witness could be cross-examined as to the facts of his religious belief for the purpose of affecting his credibility. To the same effect is Free v. Buckingham, 59 N. H. 219. But see, contra, as to eliciting facts by cross-examination, Searcy v. Miller, 57 Iowa, 613, 618, 10 N. W. 912, though this case held that peculiarities of religious belief might be shown to affect the witness' credibility.

[10] People ex rel. Niebuhr v. McAdoo, 184 N. Y. 304, 77 N. E. 260. It was held here that where a person testified without having the oath administered to him, and this fact must have been known to defendant, and counsel for defendant cross-examined, the judgment would not be disturbed. The court said: "It is a well-settled principle of law that no evidence can be permitted to go to the jury, unless under oath, without express or implied consent."

seems never to have been generally established in the United States a rule of exclusion on the ground of interest.[11] There are statutory provisions in most of the states relating to the subject [12] but they do not seem to have changed the common-law rule. In England the practice was changed by express statutory provision,[13] and later but never extended to criminal cases.[14] (1895

HUSBAND OR WIFE OF PARTY.

215. The husband or wife of a party may testify in all cases where the party himself is competent, but cannot disclose private or confidential conversations and communications.

Certain subjects involving the marital relations have been excepted from the general rule above stated. This is usually by statutory provision.[15] Except as to such matters, and as

[11] The rule as laid down by Greenleaf (1 Greenl. Ev. 327) was founded on the English common-law rule, rather than on any general basis found for it in the American cases.

[12] See Pub. St. Mass. c. 169, § 18. A statutory provision like that of Massachusetts or that in New York is quite common. The latter is as follows: "Except as otherwise specially prescribed in this title, a person shall not be excluded or excused from being a witness by reason of his or her interest in the event of an action or special proceeding; or because he or she is a party thereto, or the husband or wife of a party thereto, or of a person in whose behalf an action or special proceeding is brought, prosecuted, opposed, or defended." Code Civ. Proc. N. Y. § 828.

[13] St. 9 & 10 Vict. c. 95, § 83; St. 14 & 15 Vict. c. 99, § 2.

[14] Reg. v. Payne, L. R. 1 Crown Cas. 349, 355; Steph. Dig. Ev. art. 108. The case of Reg. v. Payne decided that one jointly indicted with others could not be a witness for or against his confederates upon a trial of all for the same offense.

[15] The provision in New York is to the effect that "a husband or wife is not competent to testify against the other upon the trial of an action or the hearing upon the merits of a special proceeding founded upon an allegation of adultery, except to prove the marriage or disprove the allegation of adultery. A husband or wife shall not be compelled, or without the consent of the other, if living, allowed, to disclose a confidential communication made by one to the other during marriage. In an action for criminal conversation, the plaintiff's wife is not a competent witness for the plaintiff, but she is a competent witness for the defendant, as to any matter in

to private and confidential communications, a husband or wife of a party is competent as a witness for or against the other. The old rule, which excluded the husband or wife of a party, had for its object "that the most entire confidence may exist between them, and that there may be no apprehension that such confidence can at any time, or in any event, be violated—so far, at least, as regards any testimony or disclosure in a court of justice." [16] It may be, too, that something lay in the idea of preventing that friction and disagreement between husband and wife which would necessarily arise from the one giving testimony against the other.[17] The disqualification in general has disappeared, through more liberal treatment of the subject in the cases,[18] or by statutory provi-

controversy, except that she cannot, without the plaintiff's consent, disclose any confidential communication had or made between herself and the plaintiff." Code Civ. Proc. § 831; Colwell v. Colwell, 14 App. Div. 80, 43 N. Y. Supp. 439. This is a fair sample of the statutory law relating to the subject. See, also, Hanselman v. Dovel, 102 Mich. 505, 60 N. W. 978, 47 Am. St. Rep. 557.

[16] Per James, J., in Chamberlain v. People, 23 N. Y. 85, 89, 80 Am. Dec. 255. See, also, for explanation and qualification of the old rule, Ratcliff v. Wales, 1 Hill (N. Y.) 63; Dickerman v. Graves, 6 Cush. (Mass.) 308, 53 Am. Dec. 41. It was held that divorce made the husband and wife competent to testify for one another, and that the rule in this respect applied only during the existence of the marriage relation.

[17] Tindal, C. J., says in O'Connor v. Majoribanks, 4 Man. & G. 435: "A wife never can be admitted as a witness against her husband. She cannot be a witness for him, because her interest is precisely identical with his; nor against him, upon grounds of public policy, because the admission of such evidence would lead to dissension and unhappiness, and possibly to perjury."

[18] Appeal of Robb, 98 Pa. 501. "On the whole, the prevailing tendency of late years, in both England and America, is to regard the domestic confidence or the ties of a spouse as of little consequence compared with the public conveniences of extending the means of ascertaining the truth in all cases; such facilities being increased, it is believed, by hearing what each one has to say, and then making due allowance for circumstances affecting each one's credibility." But see Heckman v. Heckman, 215 Pa. 203, 64 Atl. 425, where the common-law rule is held to prevail, except where statutory provision has removed the disability. Schouler, Husb. & W. 85.

sion.[19] The English rule put the husband or wife of a party on the same footing with the party himself, and accordingly, in criminal cases, never extended the rule of competency to include them.[20] There was an early exception to the rule which held the testimony of husband or wife incompetent, and that was where the trial on which the testimony was offered was for a crime committed by the one against the other. Necessity compelled the relaxation of the rule in this case.[21]

PERSONS PECUNIARILY INTERESTED.

216. Pecuniary interest no longer disqualifies a witness from testifying.

Originally persons pecuniarily interested in the suit were not permitted to testify.[22] This, however, has been entirely changed, except with respect to a witness, or a husband or wife of a witness, to a will, who is also a beneficiary under the will. This has been said to be the "sole survival of the numer-

[19] Pub. St. Mass. c. 169, § 18; Code Civ. Proc. N. Y. § 831; Westerman v. Westerman, 25 Ohio St. 500, 507; People v. Langtree, 64 Cal. 256, 30 Pac. 813. But there is still a survival of the old idea in the exception as to private and confidential matters. Here the disqualification still exists in all its force. It is one which follows the person even after the dissolving of the marriage relation by divorce, for, to quote the language of an old-time jurist: "Miserable, indeed, would the condition of a husband be if, when a woman is divorced from him, perhaps for her own misconduct, all the occurrences of his life, intrusted to her while the most unbounded confidence existed between them, should be divulged in a court of justice." There is some difference in the construction put upon the term "confidential," as used in connection with this subject, and a distinction is sometimes made between confidential matters and private matters, the exception being construed to apply to the former only. Examination of the statutes and their interpretation by the courts in the different jurisdictions must be made in each instance where the question arises.

[20] Steph. Dig. Ev. art. 108; Reg. v. Thompson, L. R. 1 Crown Cas. 377.

[21] Steph. Dig. Ev. art. 108.

[22] In Bent v. Baker, 3 Term R. 27, 36, Buller, J., defined the rule of exclusion on the ground of interest to be whether "the witness is to gain or lose by the event of the cause."

ous exclusionary rules making witnesses incompetent by reason of relationship or pecuniary interest." [23]

To-day a person interested in the outcome of a suit is allowed to testify the same as a disinterested person; but the adverse party may show by cross-examination the nature and extent of that interest as affecting the credibility of the witness.[24]

There has, however, been a certain revival, if not survival, of the disqualifying rule in certain instances, where the subject of the testimony consists of transactions with a person since deceased or insane. Here it is quite generally provided by statute that a person interested is incompetent to testify in an action against the executor, administrator, or committee of such person.[25]

NATURALLY INCAPACITATED PERSONS.

217. A person incapacitated to such an extent that he is unable to understand the subject in reference to which he is called as a witness is incompetent.

Naturally incapacitated persons were not permitted to testify. This rule has always existed, and exists to-day. It is rather a rule of necessity than anything else. Insane persons,[26] per-

[23] Best, Ev. (Chamberlain Int. Ed.) p. 178, note.

[24] Sharp v. Railroad Co., 184 N. Y. 100, 76 N. E. 923. The railroad was sued for damages sustained by reason of the negligence of the servants of the road. A servant's testimony will be received, although it is shown that the witness is interested in the outcome. The credibility of the witness is for the jury.

[25] Rev. St. U. S. § 858 [U. S. Comp. St. 1901, p. 659]; Code Civ. Proc. N. Y. § 829; Richardson v. Emmett, 170 N. Y. 412, 63 N. E. 440. See, also, Sparhawk v. Sparhawk, 10 Allen (Mass.) 155; Sutherland v. Ross, 140 Pa. 379, 21 Atl. 354; Russell v. Russell (C. C.) 129 Fed. 434; Code Civ. Proc. Neb. § 829. In re McCoy's Will, 64 Neb. 150, 89 N. W. 665. But even an interested person, barred for this reason, may testify as an expert. Hoag v. Wright, 174 N. Y. 36, 66 N. E. 579, 63 L. R. A. 163.

[26] In Livingston v. Kiersted, 10 Johns. (N. Y.) 362, the plaintiff called a witness, and the defendant thereupon offered to show that the witness was "non compos, and that he had been for some time deranged." The judge refused to allow this to be done. The court

sons too young to understand,[27] or persons temporarily incapacitated by drink,[28] are none of them considered competent to testify. With respect to insane persons, there is no absolute rule which excludes them on the mere ground of insanity. The insanity must be shown to affect their understanding at the time of their being called as witnesses, in order to render them incompetent.[29] There is a distinction to be noted between insanity at the time of the trial, insanity at the time of the transaction about which the witness' testimony is offered, and insanity at some other period. In the first case the witness is rendered incompetent to testify; in the second, he is not incompetent, but his condition at the time of the transaction may be proved, to affect his credibility;[30] in the third case the insanity has no effect, and is irrelevant. There is no definite rule as to the age at which a person is qualified to testify. The test has always been an individual one, whether in the particular case the person offered has sufficient intelligence to understand the nature and effect of an oath.[31] There is some

reversing the judgment, on appeal, said: "Idiots, lunatics, and mad men are not competent witnesses, and this must be shown to the court by proof, like any other charge of incompetency."

[27] Hughes v. Railway Co., 65 Mich. 10, 31 N. W. 603; Carter v. State, 63 Ala. 52, 35 Am. Rep. 4.

[28] Hartford v. Palmer, 16 Johns. (N. Y.) 143; Gould v. Crawford, 2 Pa. 89.

[29] District of Columbia v. Arms, 107 U. S. 519, 2 Sup. Ct. 840, 27 L. Ed. 618; Coleman v. Com., 25 Grat. (Va.) 865, 23 Am. Rep. 711.
e note to People v. New York Hospital, 3 Abb. N. C. (N. Y.) 229.
oleman v. Com., supra, it is said (page 875 of 25 Grat.): "It
seen, then, that a witness is not excluded by this rule merely
he is a lunatic. That is not enough per se to exclude him;
ist at the time of his examination be so under the in-
malady as to be deprived of that 'share of understand-
ecessary to enable him to retain in memory the events
s been a witness, and gives him a knowledge of
Lee v. State, 43 Tex. Cr. R. 285, 64 S. W. 1047.
omb, 28 Conn. 177.
In Wheeler v. U. S., 159 U. S. 523, 16 Sup.
t was held it was not error to admit the
ars old. Mr. Justice Brewer says (page
. 16 Sup. Ct. [40 L. Ed. 244]): "That
his youth, as a matter of law, abso-
s clear. While no one would think
nly two or three years old, there

mention made of an early practice of receiving the statemen of a child without the administration of the oath in a case c extreme youth, but it is not likely that this ever prevailed t any extent.[32] The question of whether a person has sufficien capacity to testify is a question of fact for the judge to de cide, and he may hear testimony on the point, as well as ex amine the person himself.[33]

PERSONS GUILTY OF CRIME.

218. Conviction of crime is no longer a disqualification The testimony of a criminal is admissible, but hi previous conviction can be shown, to affect his credi bility.

At the common law, persons who had been convicted of in famous crimes were incompetent as witnesses. Infamou crimes, in a general way, may be defined as those punishabl by imprisonment in state's prison. Just what was include in the term at common law is probably a matter of uncer tainty. The exact limits were not accurately defined.[34] Thi disqualification has been abolished by statutes declaratory c the more liberal views of the courts with respect to wit nesses.[35] The matter of conviction may, however, still b

is no precise age which determines the question of competency. Thi depends on the capacity and intelligence of the child, his apprecia tion of the difference between truth and falsehood, as well as of hi duty to tell the former." See, also, State v. Sawtelle, 66 N. H. 48 490, 502, 32 Atl. 831; State v. Nelson, 132 Mo. 184, 197, 33 S. W 809; Featherstone v. People, 194 Ill. 325, 62 N. E. 684; North Texa Const. Co. v. Bostick (Tex. Civ. App.) 80 S. W. 109.

In Shannon v. Swanson, 208 Ill. 52, 69 N. E. 869, a boy seven yea old was allowed to testify. "Intelligence and ability to comprehen the meaning of an oath, and the moral obligation to speak the truth and not age, are the tests by which the competency of a child t give testimony is determined."

[32] 1 East, P. C. 441, 444. And see note in Thayer, Cas. Ev. (2d ed.) p. 1074.

[33] Wheeler v. U. S., 159 U. S. 523, 16 Sup. Ct. 93, 40 L. Ed. 244 Com. v. Lynes, 142 Mass. 577, 581, 8 N. E. 408, 56 Am. Rep. 709 Coleman v. Com., 25 Grat. (Va.) 865, 23 Am. Rep. 711; State v Levy, 23 Minn. 104, 23 Am. Rep. 678.

[34] 1 Greenl. Ev. § 378.

[35] See, for illustration, Code Civ. Proc. N. Y. § 832.

shown, as affecting the credibility of the witness. During the existence of the disqualification it was held that "conviction" meant not only the verdict of the jury, but the actual judgment of the court. This interpretation has survived, and now obtains in respect to the proof of the conviction allowed to affect credibility.[36]

CERTAIN SPECIAL CASES OF DISQUALIFICATION.

219. There are certain special cases in which disqualification exists, among which are:
(a) Grand jurors and petit jurors, as to what took place in the jury room.
(b) Legal advisers, as to information received from or advice given to a client in the course of employment.
(c) A judge in the trial at which he is presiding.
(d) Physicians and clergymen as to information acquired in a professional capacity.

Jurors.

The authorities hold generally that neither grand nor petit jurors can disclose what takes place before them in the jury room.[37] There are certain qualifications to this doctrine which have been recognized in the cases. In a case for malicious prosecution it has been held that a grand juror could testify who was the prosecutor before the grand jury.[38] On indictments for perjury a grand juror is permitted to show that the testimony of the accused is inconsistent with that given by him before the grand jury.[39] It is probable that in any proceed-

[36] People v. McGloin, 91 N. Y. 241, 249; Com. v. Gorham, 99 Mass. 420.

[37] 1 Greenl. Ev. § 252; State v. Fasset, 16 Conn. 457; Lindauer v. Teeter, 41 N. J. Law, 255. In People v. Hulbut, 4 Denio (N. Y.) 133, 47 Am. Dec. 244, the defendant offered to show by the testimony of one of the grand jurors that there was no evidence placed before the grand jury of offenses charged in the indictment. It was held that the grand juror was incompetent to testify as to what took place in the grand jury room.

[38] Sykes v. Dunbar, 2 Selw. N. P. 1091; Huidekoper v. Cotton, 3 Watts (Pa.) 56.

[39] See opinion of Bronson, C. J., in People v. Hulbut, 4 Denio (N. Y.) 133, 135, 47 Am. Dec. 244.

ing where the regularity of the proceedings of grand jurors or petit jurors was properly called in question, or fraud charged in their performance of their functions, they would be allowed to testify.[40] It is also held that, in cases where it is sought to impeach a witness' credibility, a grand juror may disclose what the witness' testimony was before the grand jury, to show that it differed from his testimony at the trial.[41]

Legal Advisers.

The disqualification of an attorney with respect to communications between himself and a client is absolute, whether the matter be sought to be used against the client or against a third party.[42] But it does not extend to communications made in furtherance of any criminal purpose, or any fact observed showing that a crime or fraud has been committed since his employment, or any fact which the legal adviser be-

[40] For example, affidavits of jurors have been received on a motion to correct a verdict which was wrongly announced, by mistake on the part of the foreman. Dalrymple v. Williams, 63 N. Y. 361, 20 Am. Rep. 544. See, also, Woodward v. Leavitt, 107 Mass. 453, 458, 9 Am. Rep. 49. But that a juror has made statements in the jury room of his own knowledge, or that he has misunderstood instructions, or has had some improper motive, is not allowed to be shown in an attack on a verdict. St. Louis S. W. R. Co. of Texas v. Ricketts, 96 Tex. 68, 70 S. W. 315; Mattox v. United States, 146 U. S. 140, 13 Sup. Ct. 50, 36 L. Ed. 917. On a motion to quash an indictment, because it was not legally found, the testimony of grand jurors has been admitted to show that 12 of the jury concurred in finding the indictment. Low's Case, 4 Me. 439, 447, 16 Am. Dec. 271; People v. Shattuck, 6 Abb. N. C. (N. Y.) 33; Com. v. Green, 126 Pa. 531, 17 Atl. 878, 12 Am. St. Rep. 894. See, also, Hinshaw v. State, 147 Ind. 334, 47 N. E. 157.

The reasons for keeping secret the grand jury's proceeding have been stated as follows: "First, to insure free disclosures to and discussion by the grand jury; secondly, to prevent perjury and subornation of perjury; thirdly, to prevent the escape of the accused by keeping the indictment secret." 11 Harvard Law Rev. 198, citing Com. v. Mead, 12 Gray (Mass.) 167, 71 Am. Dec. 741.

[41] State v. Wook, 53 N. H. 484; Gordon v. Com., 92 Pa. 216, 37 Am. Rep. 672. And see New Hampshire Fire Ins. Co. v. Healey, 151 Mass. 537, 24 N. E. 913.

[42] Connecticut Mut. Life Ins. Co. v. Schaefer, 94 U. S. 457, 24 L. Ed. 251; Bacon v. Frisbie, 80 N. Y. 394, 36 Am. Rep. 627; Higbee v. Dresser, 103 Mass. 523.

came acquainted with apart from his character as such.[43] The cases hold that it is never a part of a legal adviser's business to advise or act in furtherance of a criminal purpose, and that, "as soon as a legal adviser takes part in preparing for a crime, he ceases to act as a lawyer and becomes a criminal." [44] The subject of an attorney's testimony as to his client's affairs must be treated from two standpoints: (1) As a disqualification on the part of the attorney, and (2) a privilege on the part of the client. It will be discussed more fully from the standpoint of privilege.[45] It is to be observed, however, that the disqualification of an attorney extends only to matters between himself and his client, and that there is no general disqualification which prevents an attorney in the cause from being a witness. It was in early times contended that such disqualification existed, but later cases dispelled the idea.[46]

Many states have statutes governing this point.[47]

Judges.

The disqualification of a judge is complete, so far as the trial in which he is presiding is concerned. There are duties which are imposed upon him in respect to the witnesses in the case which would produce embarrassing complications were he himself a witness. A judge passing upon the competency of his own testimony, if objections were interposed, determining its materiality, overruling or sustaining motions to strike it out, and deciding questions relating to his privileges as a witness, and to the impeachment by other witnesses of his

[43] Brown v. Foster, 1 Hurl. & N. 736.

[44] Steph. Dig. Ev. art. 115.

[45] Post, pp. 381, 382.

[46] 2 Tayl. Ev. § 1240; Wilson v. Grove, Toth. 177; Potter v. Ware, 1 Cush. (Mass.) 519; Follansbee v. Walker, 72 Pa. 228, 13 Am. Rep. 671.

[47] Code Civ. Proc. N. Y. § 835, is an illustration of this kind of protection. "An attorney or counselor at law shall not be allowed to disclose a communication, made by his client to him, or his advice given thereon, in the course of his professional employment, nor shall any clerk, stenographer, or other person employed by such attorney or counselor be allowed to disclose any such communication or advice given thereon." For interpretation of statute, see Doheny v. Lacy, 168 N. Y. 213, 61 N. E. 255; People v. Patrick, 182 N. Y. 131, 175, 74 N. E. 843.

testimony, would be an awkward spectacle. It is accordingly held that a judge is incompetent as a witness at a trial presided over by himself.[48] Where the judge testifies without objection by either party, it has been held that though erroneous practice, and to be severely condemned, it does not deprive the trial court of jurisdiction.[49] The disqualification of a judge does not extend to matters concerning trials had before him, if he is called as a witness in another proceeding. He may testify to all matters of fact as to the conduct of the trials.[50] And it has also been held, where judgments are given in an informal manner in petit courts, and it subsequently becomes material to determine the ground on which they were rendered, that the judge who rendered the decision is competent to testify.[51] A referee or arbitrator is in the same position as a judge, so far as disqualification is concerned.[52]

Physicians and Clergymen.

At common law there seems to have been no restriction placed upon medical men or clergymen, with respect to information obtained by them when acting in a professional capacity.[53] By statute, however, in most of the states, they have been conditionally disqualified, their testimony being excluded unless consented to by the person who is affected.[54]

Where no provision is made respecting the drawing of an

[48] People v. Miller, 2 Parker, Cr. R. (N. Y.) 197, 200; McMillen v. Andrews, 10 Ohio St. 112; Dabney v. Mitchell, 66 Ala. 495.

[49] People v. Dohring, 59 N. Y. 374, 379, 17 Am. Rep. 349.

[50] Huff v. Bennett, 6 N. Y. 337, 340.

[51] Taylor v. Larkin, 12 Mo. 103, 49 Am. Dec. 119. See, also, statement in note to Supples v. Cannon, 44 Conn. 424, 434. But see, contra, as to testifying directly, as to the ground on which the judgment was based, Agan v. Hey, 30 Hun (N. Y.) 591, though it is conceded that a judge is competent to testify as to what took place before him. See, also, Robinson v. Railway Co., 64 Hun, 41, 18 N. Y. Supp. 728, where the written opinion of the court was excluded as evidence of the ground of the judgment.

[52] Morss v. Morss, 11 Barb. (N. Y.) 510.

[53] Steph. Dig. Ev. art. 117.

[54] Code Civ. Proc. N. Y. §§ 833, 834, and 836, are illustrations of the ordinary statutory provision on this subject. For way court interprets section 836, see In re Myer's Will, 184 N. Y. 54, 76 N. E. 920; Davis v. Knights of Honor, 165 N. Y. 159, 58 N. E. 891. What will constitute a waiver. Holcomb v. Harris, 166 N. Y. 257, 59

the failure of a person to consent to his physi-
, there is some question as to whether the jury
drawing an inference unfavorable to the patient,
case it was directly held that such inference might

nciple it would seem as though the rule against in-
ought to follow the privilege in this as in other

VILEGE—DISTINGUISHED FROM DISQUALIFICATION.

). A witness who is disqualified is not permitted to testify.
A witness who is privileged is not compelled to tes-
tify, but may, if he desires, do so.
rivilege extends, in respect to certain persons, to all
ubjects, and, in respect to all persons, to certain sub-
ects.

ation of witnesses must be distinguished from
ere are many cases where persons are not dis-
testifying, but are not compellable to testify
oose to do so. This is privilege. There are
as seen in the foregoing pages, where per-
d to testify even if they desire to do so.
. Privilege, as we find it discussed in
at which relates to certain subjects, and
rsons alike, provided the necessary
ere is, however, a form of privilege
ts at all times. It is possessed
the sovereign of England. It
sovereign of that country is
courts.[56] It has been urged
States and governors of

423, 104 N. W. 61; *Hills*
A. 155.
liv. 503, 84 N. Y. Supp.
93), *argues that the*
ly privileged. See,

oír, oyendo, oído

Ind	Subj		
oígo	oiga	asgo	asga
oyes	etc	ases	etc
oye		ase	
oímos		asemos	
oís		aséis	
oyen		asen	
oía	oyera	asía	asiera
oías	etc	asías	etc
oía		asía	
oíamos		etc	asiéramos
oíais			etc
oían	oyese	asían	asiese
oí	etc	asiste	asiese
oíste		asió	etc
oyó		asimos	
oímos		asisteis	
oísteis	oyere	asieron	
oyeron			
oiré		asiré	
etc		etc	
oiría		asiría	
etc		etc	

is of small importance, and need not be further referred to. The privilege of accused persons in respect to all subjects, and that of all witnesses in respect to certain subjects, need more detailed examination.

SAME—PRIVILEGE OF ACCUSED PERSONS.

222. A person accused of crime is absolutely privileged from testifying upon his trial for the crime charged against him.

When the doctrine as to the exclusion of the testimony of parties to the action was changed so that they became both competent and compellable to testify, there was one exception made, namely, that of parties to criminal proceedings. While extending to them the privilege of testifying, neither courts nor legislatures ever went to the extent of making them compellable to become witnesses.[60] Nor would a statute to that effect be of any effect, for it would violate the constitutional provision which protects any person accused of crime from being compelled to testify against himself.[61]

The extent to which an accused person may be compelled to furnish evidence against himself, by exhibiting any portion of his body or by submitting to an examination, is not clearly settled in the cases. So far as identification goes, it seems that an accused person cannot claim his privilege, when asked to rise or to uncover his face.[62]

The tendency is not to compel an accused person to go much further than this.[63]

223. INFERENCE FROM FAILURE TO TESTIFY—The fact that an accused person exercises his privilege, and remains silent, does not furnish ground for an inference against him.

[60] 1 Greenl. Ev. (Lewis' Ed.), note to section 330.

[61] Cooley, Const. Lim. p. 386.

[62] State v. Reasby, 100 Iowa, 231, 69 N. W. 451; State v. Prudhomme, 25 La. Ann. 522.

[63] State v. Height, 117 Iowa, 650, 91 N. W. 935, 59 L. R. A. 437, 94 Am. St. Rep. 323. See note in 16 Harvard Law Rev. 300.

To secure to the accused the full benefit of his privilege silence must not be construed against him. Under the old rule, which did not permit him to testify, there was, of course, no room for an inference from his failure to testify. The granting to him of the privilege of testifying at his option would be like making evidence against him, if it were to be thereafter held that failure to exercise the privilege granted justified an inference of guilt. Take the case of an accused person who is nervous and without self-possession, and against whom there is circumstantial evidence difficult of explanation even by himself. Before the statute the case against him would have to be proved entirely without his aid. His silence would have no effect. The statute, however, grants him the right to testify. If he testifies he will, on cross-examination, at least, strengthen the case against himself. If he does not testify the jury will infer from his silence that he is guilty. So that the statute, instead of being an aid to justice, becomes an instrument of oppression. There are some cases which hold that silence justifies an inference,[64] but the general doctrine is otherwise.[65] Indeed, in the statutes relating to the subject it is frequently provided that no inference shall be drawn from failure to exercise the right of testifying.[66]

[64] State v. Bartlett, 55 Me. 200. It is submitted that the reasoning of the court in this case is fallacious in respect to this matter, and that the conclusion reached is an unjust one. See opinion, pages 218, 219 of 55 Me.

[65] In Com. v. Harlow, 110 Mass. 411, Chapman, C. J., says: "Since this class of defendants are allowed to testify if they will, there is some danger, if one exercises his right of silence, the jury will look upon it as a proper matter to weigh against him in considering the question of his guilt. It is important that courts should carefully guard his constitutional right." See, also, People v. Tyler, 36 Cal. 522, 527; Watt v. People, 126 Ill. 9, 31, 18 N. E. 340, 1 L. R. A. 403; State v. Graves, 95 Mo. 510, 8 S. W. 739; Heldt v. State, 20 Neb. 492, 500, 30 N. W. 626, 57 Am. Rep. 835.

[66] Pub. St. Mass. c. 169, § 18, par. 3, is as follows: "In the trial of all indictments, complaints, and other proceedings against persons charged with the commission of crimes or offenses, a person so charged shall, at his own request, but not otherwise, be deemed a competent witness, and his neglect or refusal to testify shall not create any presumption against him."

PRIVILEGE—An accused person who ivilege, and takes the stand in his own imself in the position of an ordinary subject to the usual cross-examina-

ce of opinion in the authorities as to of privilege on the part of the ac- deemed to have waived entirely the e to give evidence against himself, e may see fit to go in answering loctrine, and the one which seems is that he places himself in the s;[68] and having regard to the ch is the ascertainment of the y unfairness towards the ac- treat him, when he takes the ject to the usual obligations sted by cross-examination. er, be limited to legitimate t extends beyond this, the ordinary witness to re- tend to show him guilty he is being tried.[69] A e jurisdictions where imself to cross-exam- so compelled. Is it t? If it be in a ju- led to answer, but it length, there is consideration the arises in a juris-

384, 385), lays estify, he is at

L. R. A. 669; . 459, 13 Am. 189; Keyes

v. People,

diction where the witness is held to have the right to refuse to answer, it would be negativing that right to allow any inference to be drawn from his refusal.[71]

SAME—PRIVILEGE AS TO PARTICULAR SUBJECTS.

225. There are particular subjects in respect to which all persons may exercise the privilege of refusing to testify. Matters of this sort comprise

(a) State secrets.

(b) Matters tending to self-crimination.

(c) Professional communications.

The rights of the public at large and the rights of the individual demand that there should be some limit to the matters into which courts may pry. The rights of a litigant are subject to the rights of the public at large,[72] and also to the inherent right of every person to be secure in his property and person. When, in his efforts to establish his case, a litigant carries his examination of witnesses to a length which encroaches upon such rights, the law permits the witness to decline to answer.

[71] Cooley, in his Constitutional Limitations (6th Ed. pp. 385, 386), lays it down that an inference may be drawn under these circumstances. He states the Michigan practice to be as follows: "When the court had decided the question to be a proper one, it would have been left to the defendant to answer or not, at his option; but, if he failed to answer what seemed to the jury a proper inquiry, it would be thought surprising if they gave his imperfect statement much credence." Cooley cites State v. Ober, supra, as in accord with the Michigan practice, but that case held distinctly that an inference was proper, because the witness could be compelled to answer, and had no legal option to answer or not, as he saw fit; and in the opinion it is distinctly said that (page 463 of 52 N. H. [13 Am. Rep. 88]), "If the ruling that the prisoner had the right to decline answering had been correct, we should agree with his counsel that the subsequent ruling (that his refusal could be commented on to the jury, and an inference drawn) could not be sustained. As it was held that he could have been compelled to answer, it was also held that an inference was proper.

[72] See opinion of Pollock, C. B., in Beatson v. Skene, 5 Hurl. & N. 838, 853.

SECRETS—With respect to public matters, the lege extends to public officers, their subordinates, ny who may be cognizant of such matters, though public office.

se of high public officers in co-ordinate branches government, the courts leave the determina- what is privileged matter to their own judg-

ets consist of communications between public transactions in public bodies, acts of the ex- partment, information obtained in the course r the purpose of, the enforcement of the law, and other like matters.

s to state secrets may be claimed either by y person who has knowledge of the subject, ied as a witness. Speaking with respect to prosecutions for crime, an eminent jurist f justice, therefore, will not compel or al- such information, either by the subordi- t is given, by the informer himself, or by hout the permission of the government. ed, not for the protection of the witness rticular case, but upon general grounds se of the confidential nature of such

to who is to determine whether the a matter which is properly a subject of high public officers, such as the ments, and Governors of states, the at the officer who is a witness may himself,[74] although the courts have eir own determination of the same t the public officer should conform , held that they will go no further e their determination, as against

Scribner, 109 Mass. 487, 489, 12 Am. Hartranft, 85 Pa. 433, 27 Am. Rep. ended to the Governor, Secretary a general and major of the na-

308) vol. 1, pp. 249, 254, Fed. Cas.

refuses to testify.[75] In the case
ting under instructions of his su-
te citizen claiming the privilege
the court would have to deter-
claimed.[76] The matters which
ege cover a wide range. Any act
o, or information possessed by,
s to be embraced within it.[77]

**MATTERS—Any person who
r he be a party or stranger to
to answer questions, the legiti-
ich would be to show that he
s**

s forming the subject of the rules
nesses are those of a self-incrimi-
the attention of the courts in the
nt than any other matters of priv-
this privilege is a common-law
into constitutions and statutes.[80]

oad Co., 22 N. J. Eq. 111; Appeal
Skene, 5 Hurl. & N. 838, 853.
2 N. J. Eq. 111.
rl. & N. 838, 854.
ited in the foregoing notes to this
ion of the matters included, Chubb
0; Attorney General v. Briant, 15
Soper, 16 Me. 293, 295, 33 Am. Dec.
Fed. 439.
For an exhaustive discussion of the
ticle by Prof. John H. Wigmore, of
w School, in 15 Harvard Law Rev.

1684) we find the following: "Ros:
you been at? Smith: Concerning
any other conventicles of the fa-
st? Smith: I do not know whether
s: What say you, Mistress Smith?

U. S. Comp. St. 1901, pp. 660, 661];
espeake Club v. State, 63 Md. 446,

The rule has acquired a sacredness, by reason of having so generally been made a constitutional matter, possessed by none of the other rules of privilege. Yet even in early times the rule had a strong place in the feelings of the people. This came about through the revulsion of feeling against the inquisitorial methods adopted in early times for the discovery of crime. The political struggles in England, bringing in their wake trials for political crimes, with their Star Chamber methods, impressed upon the people the necessity of protection from unlimited inquiry into private affairs under the guise of the law. The rule accordingly became firmly established, and was invariably respected by the courts as fixing a limit beyond which they could not go. Matter privileged under this head includes anything which would tend to subject the witness to imprisonment, forfeiture or confiscation of lands, or to a penalty,[81] but does not extend to matter which would make him subject to civil damages.[82] It may happen that the matter concerning which a witness claims his privilege, while incriminating, will not prejudice the witness, by reason of his having been previously tried and acquitted, or because the statue of limitations has run against the offense. Under such circumstances it has been held that the privilege is not applicable.[83]

But, where it has been expressly provided by statute that no testimony given by a witness in proceedings to which the statute relates shall be offered in evidence against him in any criminal proceeding, it has nevertheless been held that a witness who refuses cannot be compelled to answer—that his constitutional privilege still exists.[84] This has not been the universal rule,

L. C. J.: No; no; that you must not ask her; that is to accuse herself. Just. Hol.: You must not ask her anything but that you stand here charged with. L. C. J.: You must not ask her anything that may make her obnoxious to any penalty."

[81] Pye v. Butterfield, 5 Best & S. 829, 838; Raines v. Towgood, Peake, Add. Cas. 105.

[82] Bull v. Loveland, 10 Pick. (Mass.) 9.

[83] Close v. Olney, 1 Denio (N. Y.) 319.

[84] In re Rosser (D. C.) 96 Fed. 305. In this particular case the statutory provision in question was that contained in section 7 of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 548 [U. S. Comp. St. 1901, p. 3424]). See, also, In re Kanter (D. C.) 117 Fed. 356. In another instance, where the statute was framed more broadly with

however, and it would seem that, if the provision of the statute is strong enough and broad enough to completely protect a witness, there would then be no place for the application of the constitutional provision.[85]

230. SAME—HUSBAND OR WIFE OF WITNESS PROTECTED—A witness may also refuse to disclose matters tending to show that the husband or wife of such witness is guilty of a crime.

The same principle—that of unity of interest—which prevented the husband or wife of a party to the suit from being a witness when the party himself was disqualified was also held to protect the husband or wife of a witness under the privilege as to incriminating matters. And, as the privilege has come down to us to-day only strengthened and re-enforced by statutory and constitutional enactment, so, also, has the phase of it relating to the marital relation.[86] One's marital partner is recognized by the courts as possessing an identity of mental and moral interest which precludes the idea of compelling one to place such partner in jeopardy of punishment for crime. The rule is a healthy one, and productive of good results, in encouraging the intimate, harmonious relations which should exist between husband and wife to make the conjugal relation of greatest benefit to the state.[87]

respect to the use of the incriminating evidence, it was held that the constitutional provision had no application. Brown v. Walker, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819.

[85] Brown v. Walker, supra.

[86] The English doctrine seems to be that the husband or wife is a competent witness, but not a compellable one. 1 Hale, P. C. 301; Rex v. Inhabitants of All Saints, 6 Maule & S. 194, 199; Rex v. Inhabitants of Bathwick, 2 Barn. & Adol. 639, 647. Some of the American cases hold that the husband or wife is competent to testify to incriminating matter against the other. Kelly v. Drew, 12 Allen (Mass.) 107, 90 Am. Dec. 138; State v. Wilson, 31 N. J. Law, 77; State v. Bridgman, 49 Vt. 202, 24 Am. Rep. 124. But see Royal Ins. Co. v. Noble, 5 Abb. Prac. N. S. (N. Y.) 54; State v. Briggs, 9 R. I. 361, 11 Am. Rep. 270, which follow the English doctrine.

[87] State v. Wilson, 31 N. J. Law, 77. The extent to which the courts will carry this rule is shown in Moore v. State, 45 Tex. Cr. R. 234, 75 S. W. 497, 67 L. R. A. 499, 108 Am. St. Rep. 952, where the

231. SAME — HOW PRIVILEGE CLAIMED — The privilege must be claimed by the witness personally after the question has been put to which he declines to give an answer.

The method of availing oneself of the privilege is by claiming it after the question has been put. It is the prevailing doctrine to allow the examining attorney to put the questions, and to allow them to stand on the record. The witness must then decline, in each instance, to answer, stating his ground. The privilege must be claimed personally. An attorney in the suit cannot claim it for the witness, nor an attorney acting for the witness,[88] though it is common practice for an attorney in the suit to call the witness' attention to the matter, either directly, or through application to the court for instruction to be given to the witness as to his rights.[89] Where, on a criminal trial, the accused is a witness for himself, he does not, however, lose his character as a party; and in such case his attorney can claim on his behalf the privilege, and, in case of denial, may take an exception and bring the matter up on appeal.[90]

232. SAME—WAIVER OF PRIVILEGE—A witness may waive his privilege, and testify concerning incriminating matter, in which case he is bound to answer fully.

The general American doctrine is that a witness who enters into a subject which is incriminating must answer all questions relating to that subject.[91] He cannot stop at will after having

witness was allowed to exercise her privilege, although it was shown that she was the only eyewitness of the crime, and the defendant had married her solely to prevent her testifying against him. In an action of bigamy the wife is a competent witness. Hills v. State, 61 Neb. 589, 85 N. W. 836, 57 L. R. A. 155.

[88] People v. Priori, 164 N. Y. 459, 58 N. E. 668; Com. v. Shaw, 4 Cush. (Mass.) 594, 50 Am. Dec. 813; Roddy v. Finnegan, 43 Md. 490, 502; White v. State, 52 Miss. 216, 225; Lothrop v. Roberts, 16 Colo. 250, 27 Pac. 698.

[89] But it has been held that there is no duty imposed on the court to warn the witness. Com. v. Shaw, supra.

[90] People v. Brown, 72 N. Y. 571, 28 Am. Rep. 183. But see State v. Wentworth, 65 Me. 234, 242, 20 Am. Rep. 688.

[91] 1 Whart. Ev. § 539; Foster v. Pierce, 11 Cush. (Mass.) 437, 59

233. SAME—REMEDY IN CASE OF DENIAL OF PRIVILEGE —In case of denial of privilege to a witness who claims it, he has, if a party, two remedies, appeal or habeas corpus proceedings; if a stranger he has but one, habeas corpus.

The remedy of a party to the suit, who, as a witness, is denied his privilege, and ordered to testify is (1) by refusal to obey the order, and, on commitment for contempt, to obtain a writ of habeas corpus, and thus test the question; or (2) by taking an exception to the ruling of the court, giving the testimony, and bringing the question up on appeal. It is in some jurisdictions held that in case a witness who is a stranger to the suit is erroneously compelled to testify to incriminating matters, the party to the suit who is injured thereby may obtain relief by exception and appeal.[94] Where a witness not a party to the suit has the privilege denied him, the only way in which he can assert his right is by refusing absolutely to answer, go to jail for contempt, and bring the question up on habeas corpus proceedings.[95] If, however, a witness, not allowed to exercise his privilege where he properly should be allowed, gives his testimony, it cannot be used against him.[96]

234. SAME—INFERENCE FROM EXERCISE OF PRIVILEGE —The jury are not permitted to draw any inference as to the facts in issue from the refusal of a witness to answer on the ground of privilege.

[94] Com. v. Kimball, 24 Pick. (Mass.) 366, 369; State v. Olin, 23 Wis. 309, 319. See, contra, Reg. v. Kinglake, 22 Law T. (N. S.) 335.

[95] See note on pages 410–415, Hurd, Hab. Corp. (2d Ed.). An illustration of the unsuccessful resort to habeas corpus proceedings by a witness who refused to produce books requested of him is found in Burnham v. Morrissey, 14 Gray (Mass.) 226, 74 Am. Dec. 676. This case shows how the right of a witness to refuse to answer may be tested in such proceedings.

[96] Horstman v. Kaufman, 97 Pa. 147, 152, 39 Am. Rep. 802. In Reg. v. Sloggett, 7 Cox, Cr. R. 139, the witness having testified to incriminating matter without having claimed his privilege, it was held that it could be used against him in a subsequent proceeding, though it was conceded that the result would have been otherwise had he objected to giving the testimony.

The principle which governs in the case of the drawing of inferences from the refusal of accused persons to testify has a similar application here; at least, so far as parties to civil actions and proceedings are concerned. A party who is a witness would be denied the benefits of his privilege if he were to be punished for exercising it by having an inference drawn unfavorable to him. A party to a civil action or proceeding who takes the stand either in his own behalf, or on subpœna from the other side, does not offer himself as a witness to facts which tend to criminate him, any more than a stranger to the suit who is a witness. In this respect he differs from a party to a criminal proceeding, who, when he takes the stand, knows that the subject of his testimony is the criminal charge against him, and therefore must be regarded as waiving his privilege. In the latter case, if the party be allowed to refuse to answer, he cannot complain of an inference being drawn from that fact. In the former case the matter stands differently. The party may not in any sense have waived his privilege, and, if a refusal to testify concerning incriminating matter is to be allowed against him, it is a virtual denial to him of the benefit of the privilege. If the subject-matter of the action is such that in taking the stand he must contemplate testifying concerning incriminating facts, and his examination, as far as it goes, relates to such facts, this would, of course, be a waiver, and in that event he could not complain of an inference being drawn in case he is allowed to refuse to answer.[97] In the case of a stranger to the

[97] See Stover v. People, 56 N. Y. 315, 320; Morgan v. Kendall, 124 Ind. 454, 24 N. E. 143, 9 L. R. A. 445. It is submitted that the case of Morgan v. Kendall, which holds that an inference may be drawn against a party to a civil suit who is called to the stand by his adversary, and declines to testify on the ground that his answers might tend to incriminate him, is incorrect on principle. The case of Andrews v. Frye, 104 Mass. 234, relied on by the court in support of the doctrine laid down, was entirely different. In that case the party offered himself as a witness, and was construed, by his voluntary testimony, to have waived his privilege. In the Indiana case the defendants were called as witnesses by the plaintiff. In its opinion the court puts the following case by way of illustration: "Suppose A. institutes suit against B. to recover the value of a horse which A. alleges B. has stolen from him. On the trial of the cause A. testifies that he saw B. take the horse from the stable, and then places B. upon the witness stand, and asks him if he did not take

suit exercising his privilege, the spirit of fairness demands that the jury should not draw an inference unfavorable to either party, for the privilege is something with which neither has anything to do.[98] Nor, in a criminal case, is any inference to be drawn from the failure of a husband or wife of the accused to become a witness in his behalf. If husband or wife is a witness, he or she could, as we have seen, refuse to testify to matter incriminating the other. In a criminal case, however much it may appear that a wife could explain the facts, she need not take the stand, and no inference will be permitted from her failure.[99]

235. SAME—PRIVILEGED MATTER TO BE DETERMINED BY COURT—The question of whether an answer might tend to criminate is a preliminary question of fact, which it is for the court to determine.

The question of what matter may tend to incriminate is for the court to determine from the nature of the subject which is being inquired into, the trend of the examination as shown by the previous questions, and the facts as they have been testified to by the witness previous to claiming the privilege.[100] A witness cannot be left to say for himself when he will or will not answer questions, and then defend himself from punishment for contempt by hiding behind his privilege.[101] It must be fairly evident that the answer, if given, will bring out incriminating matter, or the witness will be directed to answer. It must relate to "a fact which directly implicates his own character, not

the horse at the time and place charged. B. declines to answer, alleging and stating as a reason that his answer would tend to criminate him,"—and concludes that such conduct on the part of B. is proper for the jury to consider in evidence against him. But wherein has B. waived his privilege? By being a party defendant in the suit? He could not help that. By going on the witness stand? He could not help that. The illustration seems to lead most emphatically to the very opposite conclusion to that reached by the court.

[98] Beach v. U. S. (C. C.) 46 Fed. 754.

[99] Knowles v. People, 15 Mich. 408, 413.

[100] Phelin v. Kenderdine, 20 Pa. 354, 363; Chesapeake Club of Annapolis City v. State, 63 Md. 446, 457.

[101] 1 Whart. Ev. § 538.

indirectly and by inference." [102] At the same time the courts are disposed to give a large latitude to the witness in matters of this sort, and to allow him to determine, within limits of reasonableness, when an answer would tend to criminate him.[103] The real question for the court should be, not whether it might, under some conceivable circumstances, tend to criminate, but whether its reasonable effect will be in that direction. In many jurisdictions there are statutes providing that evidence given by a witness in respect to particular subjects shall not be used against him in any other proceeding. This has been claimed to operate as a destruction of a witness' privilege in respect to matters tending to criminate. This, however, is a too strong construction of the statute. In fact, where the constitution guaranties the privilege to a witness, such a construction might render the statute unconstitutional.[104]

236. PROFESSIONAL COMMUNICATIONS—At common law, in very early times, a privilege was recognized as to matters between an attorney and his client, and this privilege has continued in the strictest form to the present day. An attorney is neither compelled nor permitted, without consent of his client, to disclose communications made to him by a client. A client is not compelled to disclose such communications.

[102] Shaw, C. J., in Com. v. Kimball, 24 Pick. (Mass.) 366, 369.

[103] In People v. Forbes, 143 N. Y. 219, 38 N. E. 303, one Taylor was committed for contempt for declining to answer certain questions while he was a witness before the grand jury, on the ground the answers might tend to incriminate him. He brought a writ of certiorari to review the commitment. Judge O'Brien, delivering the opinion of the court, says (page 231, 143 N. Y., and page 306, 38 N. E.): "The weight of authority seems to be in favor of the rule that the witness may be compelled to answer when he contumaciously refuses, or when it is perfectly clear and plain that he is mistaken, and that the answer cannot possibly injure him, or tend in any degree to subject him to the peril of prosecution. But the courts have recognized the impossibility in most cases of anticipating the effect of an answer. Where it is not so perfectly evident and manifest that the answer called for cannot incriminate as to preclude all reasonable doubt or fair argument, the privilege must be recognized and protected."

[104] Counselman v. Hitchcock, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110. A full discussion of the matter, and extensive citation

In most of the early cases the question arose as between a party to the suit and his attorney, but the doctrine as it stands to-day is that such matter is privileged whether the witness be a party to the suit or a stranger. It will be observed that with respect to the attorney the privilege is merged in the positive disqualification, which, as explained,[105] prevents an attorney from testifying as to these matters. Strictly speaking, therefore, when an attorney who is a witness refuses to answer a question on the ground that the answer would disclose a professional communication, he is not claiming a privilege so much as he is stating a fact to the court which will show his disqualification to testify as to certain matters. He cannot testify whether he wishes to or not, unless his client consents.[106] On the other hand, when the client refuses to answer on this ground he is claiming a privilege which he may waive if he chooses. The presence of a third party at the professional consultation between attorney and client will not take the consultation out of the realm of privilege, if the third person was present in behalf of the client,[107] or if the third person was interested and is present for the mutual benefit of the two, as where two persons are separately indicted for the same offense, and meet together with their respective counsel to consult.[108]

A seeming exception to the rule is found in the case where an attorney is allowed to testify to communications made by a deceased client respecting the intention of the client in respect to disputed provisions of a will. Such communications, it has been held, are not privileged where the suit is between devisees, and in fact the reason for the rule, namely, the pro-

of authorities will be found in the opinion of Mr. Justice Blatchford in this case. See, also, Emery's Case, 107 Mass. 172, 9 Am. Rep. 22; People v. Sharp, 107 N. Y. 427, 14 N. E. 319, 1 Am. St. Rep. 851. But see, contra, People v. Kelly, 24 N. Y. 74.

[105] Ante, p. 364.

[106] Chirac v. Reinicker, 11 Wheat. (U. S.) 280, 294, 6 L. Ed. 474; Bacon v. Frisbie, 80 N. Y. 394, 36 Am. Rep. 627; Higbee v. Dresser, 103 Mass. 523; Hemenway v. Smith, 28 Vt. 701; Sweet v. Owens, 109 Mo. 1, 7, 18 S. W. 928; Basye v. State, 45 Neb. 261, 281, 63 N. W. 811; Riley v. Johnston, 13 Ga. 260, 268; People v. Atkinson, 40 Cal. 284.

[107] Bowers v. State, 29 Ohio St. 542.

[108] Chahoon v. Com., 21 Grat. (Va.) 822, 834.

tection of the client's interests, would seem to have no application in this case.[109]

The fact of the decease of the client has no bearing on the admissibility of the communication, as, where a third party claims against the representatives of the deceased client, the rule applies.[110]

237. SAME—WHEN RELATION OF ATTORNEY AND CLIENT EXISTS—The relation of attorney and client, for the purpose of this rule, exists when there has been a genuine professional employment by and representation of the client in respect to the matters to which the communication relates.

It is frequently a question of some nicety to determine just when the relation of attorney and client exists. In general it may be said that a bona fide employment is necessary, and the communication must be during such employment, and not a merely casual one.[111] Neither a formal retainer is necessary, nor is it absolutely essential that any fee at all be paid for the advice given.[112]

This has been extended to the clerks, stenographers, and those employed by an attorney, deriving their information through their employment.[113]

An attorney acting simply as copyist or as scrivener in the preparing of deeds, mortgages, and the like, cannot claim the privilege;[114] nor a law student;[115] nor an attorney represent-

[109] Glover v. Patten, 165 U. S. 394, 17 Sup. Ct. 411, 41 L. Ed. 760.

[110] Russell v. Jackson, 9 Hare, 393.

[111] Coon v. Swan, 30 Vt. 6.

[112] Thorp v. Goewey, 85 Ill. 611, 615; Orton v. McCord, 33 Wis. 205, 212. But see De Wolf v. Strader, 26 Ill. 225, 79 Am. Dec. 371, which declares the contrary doctrine, saying: "There is no retainer shown, or offer to retain or fee paid. This, and this only, can constitute that relation." For a very broad construction of the rule, see Cross v. Riggins, 50 Mo. 335.

[113] Code Civ. Proc. N. Y. § 835.

[114] Borum v. Fouts, 15 Ind. 50, 53; Randel v. Yates, 48 Miss. 685; Hebbard v. Haughian, 70 N. Y. 54. But see Rogers v. Lyon, 64 Barb. (N. Y.) 373.

[115] Barnes v. Harris, 7 Cush. (Mass.) 576, 54 Am. Dec. 734. In this case the party supposed he was consulting an attorney, but the

ing both parties,[116] though in the latter case the communications, while not privileged as to the parties, might be with respect to third persons. It is merely a case of both parties being clients for the purposes of compromise, or some other special purpose. It is for the court to determine when the relation exists, and not for the witness. The witness may even disclaim acting as attorney, yet, if the facts appear to the court to have brought about such a relation, the witness will not be permitted to testify.[117] There are many other decisions as to the application of the rule in particular cases, but they all point to the same end, to wit, a genuine professional employment.

238. SAME—WHAT INCLUDED IN PRIVILEGED MATTER —The thing that is privileged is not the facts about which the communication was had, but the communication itself, or what was said between the attorney and client.

The rule is a broad one in its scope, and covers every communication made with respect to rights or liabilities of a client, whether or not there is litigation pending.[118]

court held that made no difference. See, also, Sample v. Frost, 10 Iowa, 266; Schubkagel v. Dierstein, 131 Pa. 46, 18 Atl. 1059, 6 L. R. A. 481.

[116] Gulick v. Gulick, 38 N. J. Eq. 402; Goodwin Gas Stove & Meter Co.'s Appeal, 117 Pa. 514, 12 Atl. 736, 2 Am. St. Rep. 696; Cady v. Walker, 62 Mich. 157, 28 N. W. 805, 4 Am. St. Rep. 834; Hanlon v. Doherty, 109 Ind. 37, 43, 9 N. E. 782.

[117] Bacon v. Frisbie, 80 N. Y. 394, 399, 36 Am. Rep. 627; Maxham v. Place, 46 Vt. 434, 443.

[118] Rogers v. Daniels, 116 Ill. App. 515. In an action of assumpsit the court held that evidence tending to show that the plaintiff looked to another person for payment at the time of the happening was properly excluded, since it came under the head of privileged communication. The court said: "The rule as to privileged communications extends to every communication which the client makes to his legal adviser for the purpose of professional advice or aid upon the subject of his rights and liabilities, and it is not essential that any judicial proceeding in particular should have been commenced or contemplated. It is enough if the matter in hand may, by possibility, become the matter of judicial inquiry." Rooney v. Casualty Co., 184 Mass. 26, 67 N. E. 882.

There is some conflict in the law as to whether communications made by a third party present at the consultation between attorney and client are privileged. On principle it would seem that if the third person is present for the purposes of the conference, and was not a mere casual listener, his part in the conversation should be privileged.[119]

If, however, a client, having a knowledge of certain facts, discloses these facts to his attorney, the facts themselves are not thereby rendered privileged. The client, but not the attorney, may still be asked and compelled to testify to what he knows concerning them, because his knowledge was not derived through the communication with his attorney. Facts, on the other hand, of which a knowledge was acquired solely through the communication, the witness may refuse to state, because to compel him to state them would be to compel him to give the substance of the professional communication. This would be the position of the attorney in the illustration just above. Having acquired knowledge of the facts solely from his client, he could not testify concerning them. Anything which happened in the presence of an attorney, and which, as a fact, he acquires knowledge of by observation, even though it relate to or involve or be the act of his client, provided it happens or is done outside of, and without reference to, the professional relation, is not privileged.[120] Facts of which the attorney had knowledge prior to the communications between himself and his client, or of which he acquires knowledge from other sources than through his relation with his client, are not included in privileged matters.[121]

[119] Such communications were held privileged. Hartness v. Brown, 21 Wash. 655, 59 Pac. 491; Greenough v. Gaskell, 1 Myl. & K. 98. See, contra, People v. Buchanan, 145 N. Y. 1, 39 N. E. 846; In re O'Donohoe, Fed. Cas. No. 10,435.

[120] State v. Stone, 65 N. H. 124, 18 Atl. 654. Compare Kaut v. Kessler, 114 Pa. 603, 7 Atl. 586.

[121] Chillicothe Ferry Road & Bridge Co. v. Jameson, 48 Ill. 281.

RENCE FROM EXERCISE OF PRIVILEGE
privilege is claimed, no inference is per-
the refusal to testify.

rule in respect to all matters of privilege,
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ege, and ultimately cause less free-

IENT—The client may release
lisqualification, and may him-
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ney testifying, it would seem
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espect to it.[123]

Am. Rep. 362; Big-
Iowa, 392. Contra,
3, 200, 3 Am. Rep.
1.
E. 843.

CHAPTER XIII.

EXAMINATION OF WITNESSES.

241. Ordinary Method of Examination.
242. Exclusion of Witnesses.
243. Witness to Testify Orally.
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245. Admissibility of Papers Used to Refresh Recollection.
246. Deception of Court by Witness.
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259. Scope Unlimited in Respect to Credibility.
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263. Purpose of Re-examination.

ORDINARY METHOD OF EXAMINATION.

241. The regular method of procedure in the trial of a case requires the parties in turn to introduce their proof, beginning with the one who has the affirmative of the issue, and each in his turn putting in all which he intends to bring forward to support his case.

The successful and orderly administration of justice requires that some system be followed in the introduction of testimony upon a trial, and a uniform system has grown up; a system which has satisfied the English and American idea of fair play. It is, in brief, that each party shall have his say,—i. e., put forward his case by his witnesses—and shall complete it without interruption except by cross-examination. The trial thus proceeds by stages until the issues are exhausted. The plaintiff

usually begins and must put in his whole case; that is, all the testimony which he intends to offer to support the claims he has made. The defendant then proceeds to put in all the testimony which he has to disprove the facts as shown by plaintiff's witnesses, and, if there is an affirmative defense, to support the facts set up in his pleading. The plaintiff then again takes up the work, and is permitted to put in what testimony he has to explain, qualify, or contradict any matter in the defendant's testimony; but he cannot add to his original case. The parties may thus proceed by alternate stages as long as the court, in its discretion, deems anything will be gained in the clarifying of the issues.[1] As a practical matter, the case is usually confined to three, or, where there is an affirmative defense or counterclaim, four, stages.

The regular order of proof may be and frequently is departed from by the court. In particular cases the circumstances may prevent the production of a witness by the plaintiff at the proper time, and he may be allowed to examine him after the defendant has put in the whole or a part of his case. The court is not bound to allow any departure from the ordinary methods of proceeding. It is simply a matter of discretion, and therefore not a ground for assignment of error.[2]

[1] People v. Linares, 142 Cal. 17, 75 Pac. 308.

[2] Philadelphia & T. R. Co. v. Stimpson, 14 Pet. (U. S.) 448, 462, 10 L. Ed. 535; Livingston v. Com., 7 Grat. (Va.) 658. In the case first cited, testimony was offered by the defendants after they had stated in open court that they had closed their evidence, and after the plaintiff had discharged his witnesses. The court excluded it, on the ground that it was not a proper time to receive it. In sustaining this ruling, the Supreme Court, per Mr. Justice Story, says: "If every party had a right to introduce evidence at any time, at his own election, without reference to the stage of the trial in which it is offered, it is obvious that the proceedings of the court would often be greatly embarrassed, the purposes of justice be obstructed, and the parties themselves be surprised by evidence destructive of their rights, which they could not have foreseen, or in any manner have guarded against. It seems to us, therefore, that all courts ought to be, as indeed they generally are, invested with a large discretion on this subject, to prevent the most mischievous consequences in the administration of justice to suitors." In the second case, testimony was admitted after the case had been submitted to the jury, and they had failed to agree.

EXCLUSION OF WITNESSES.

242. It is within the discretion of the court to have all or any of the persons who are intended to be witnesses in the case excluded while any one witness is being examined.

This is only another instance of the application of the principle of fairness which characterizes our judicial proceedings. Apparently this practice of excluding witnesses has existed from the earliest times.[3] The advantage is obvious, as in many cases the testimony of uncertain or dishonest witnesses might be affected by the testimony of other witnesses given in their hearing, and the effect of which they could see.[4] In case of refusal by or failure of a witness to leave the courtroom the only remedy appears to be for the court to punish the witness for contempt of court. It has been said that in such cases the court may refuse to hear the testimony of the witness, but this would appear to be rather unfair punishment in its effect upon the party producing the witness, as he may have no control over him. The generally accepted opinion is that punishment for contempt is the appropriate remedy as against the witness, and that the party himself shall not suffer from the behavior of the witness further than that it may be made the subject of comment by opposing counsel in so far as it seems to affect the witness' testimony.[5]

[3] "And, if necessity so require, the witnesses may be heard and examined apart, till they shall have deposed all that they have to give in evidence, so that what the one has declared shall not inform or induce another witness of the same side to give his evidence in the same words, or to the very same effect." Fort. De Laud. c. 26 (1464–70), page 91 in Gregor's translation. See, also, Thayer Cas. Ev. (2d Ed.) p. 5.

Prof. Wigmore in an able article on "Sequestration of Witnesses," cites the story of Daniel's judgment in Susanna's case from the Scriptures as an early instance of this practice. 14 Harvard Law Rev. 475.

[4] 1 Greenl. Ev. § 432, and notes.

[5] Best, Ev. § 636; McHugh v. State, 42 Ohio St. 154, 158; Taylor v. State, 130 Ind. 66, 70, 29 N. E. 415; Gregg v. State, 3 W. Va. 705, 713; Hubbard v. Hubbard, 7 Or. 42; State v. Falk, 46 Kan. 498, 26 Pac. 1023. But it is held in Sartorious v. State, 24 Miss. 602, 608,

A party to the suit cannot, however, be excluded from the courtroom as a witness. He has the right to be present at all times.[6] Nor does the right to exclude extend to an attorney in the case.[7]

WITNESS TO TESTIFY ORALLY.

243. It is the general rule that the testimony of a witness is to be given viva voce.

When testimony is to be given in court at a trial, it is to be given verbally, in the presence of the court and jury, where the behavior, expression, and gestures of a witness may be seen. One cannot write out his testimony, and read it to the jury himself, or have it read. One of the strongest indications of the truthfulness of a witness is his manner under the particular circumstances which surround the giving of his testimony. This is, of course, lost to the jury unless the witness testify orally before it. Wherever possible, therefore, and except where necessity compels testimony to be taken by deposition, the witness is to be personally present, and state orally such facts as he may be called upon to give.[8]

It has been seen in the rules heretofore discussed in the ›ter on "Hearsay" that a witness is expected to testify from ›vn knowledge. In the examination of witnesses much ›e is brought out between the ideas and language of ›itnesses in reference to their own knowledge of the ›hich they are questioned. One witness will know ›r will have a recollection, and another will only ›f giving his impression as to it. The chances

› its discretion, exclude the witness' testimony

79 Mich. 198, 203, 44 N. W. 592.
›3, 179, 17 Atl. 483.
›on, 113 U. S. 656, 5 Sup. Ct. 691, 28 L.
›nce Co., 13 Adol. & E. (N. S.) 292, a
› commission answered a general
›h the facts in controversy by sub-
›e had previously made. Upon
› the witness at the trial, it
›cluded.

are that all mean the same. Knowledge consists of an impression on the senses; and when the circumstances show, as they usually will, that what a witness calls an impression is not an opinion based on information, but the result of his own observation, such impression is admissible. As has been said: "No line can be drawn for the exclusion of any record left upon the memory as the impress of personal knowledge because of the dimness of the inscription." [9] And a witness' knowledge, however uncertain, may always be introduced for what it is worth.[10]

With certain persons physical disability requires answers to be either written or made by signs, as in the case of deaf mutes.[11]

REFRESHING MEMORY OF WITNESS.

244. The attention of a witness may be called to written or printed statements or memoranda, either made by himself or with which he has been in some way connected, for the purpose of refreshing his memory.

It frequently happens that in cases where there is a large amount of detail, such as figures, accounts, plans, and specifications, a witness is permitted to refer to a paper, and the paper is perhaps put in as representing the correct statement of the facts. This is, however, only for convenience in getting details which the witness might give orally, if allowed the time, in proper shape before the court. In such matters the written statement contains what the witness would testify orally if questioned in detail and at length, and is admitted usually by consent, or at least without objection, for the purpose of saving time.[12] This is not, however, the sort of thing that is referred to when we speak of "refreshing memory." In the case

[9] Sawyer, J., in State v. Flanders, 38 N. H. 324, 332.

[10] State v. Flanders, supra; Humphries v. Parker, 52 Me. 502.

[11] Dobbins v. Electric Co. (Ark.) 95 S. W. 794.

[12] In Blandy's Case, 18 How. St. Tr. 1118, 1138, a written description of the appearance of the organs of the body, made by an expert at the time of an autopsy, was allowed to be read by the expert. In Culver v. Marks, 122 Ind. 554, 566, 23 N. E. 1086, 7 L. R. A. 489, 17

of a paper used to refresh memory the contents of the paper ıre not admitted as what the witness would testify if questioned ally. The paper may contain matters entirely different from facts which it suggests to the witness' mind, and to which vill testify. It need not be a paper which the witness himıas written.[13] The idea is, that it is in the nature of a sugn to the witness' mind; that it excites a recollection, so can then testify from independent memory that the facts n the document, or the facts which are suggested to by it, are true.[14] If the writing is not only not in the andwriting, but is one which he has never seen bevious that it, as a writing, cannot refresh his recolif he has never seen it, it can recall nothing to his it contains, however, may suggest to his mind he may have lost sight. In this view it is like on, which suggests matter to the witness' mind [15]

e submission of a paper or memorandum to a her (1) to excite in his mind an independent acts to which the paper refers or with which 2) to convince the witness that the facts true, by reason of a previous connection ss with the paper. It is obvious that the

rt accountant's statement, made from his ts, was admitted.
64, 39 Am. Rep. 426; Davis v. Field, 56 . 2 Camp. 112; Huff v. Bennett, 6 N. court say (page 339): "It was insisted s could only testify to such facts as that his recollection of the facts ining memoranda either made by h the rule is that a witness in gen- s are within his own knowledge d that he is permitted to assist n instrument, memorandum, or that such writing should have that it should be an original can speak to the facts from

a paper is not admissible ay (Mass.) 322, 328.

first effect in no wise distracts from the witness' possession as a witness to the facts. He testifies that the facts are true, because he remembers them. The second effect, on the contrary, takes from him his character as a witness to the facts, and leaves him in the position of simply identifying a previous unsworn statement made by him, and giving his inference as to its truthfulness. He is of opinion that the facts stated are true because he wrote the statement, or saw it written, or read it over, and signed it at the time. The use of a paper when it produces effect (1) is legitimate, and in accordance with the general scheme for the examination of witnesses adopted by our courts. It introduces no new element into the situation as between examining counsel, witness, and jury. The use of a paper when effect (2) is produced is a distinct innovation. It is practically the substitution of a written statement for the oral testimony which our practice calls for. Further than this, it is a virtual deprivation of the right of cross-examination to the party against whom the testimony is offered; for, if the witness has no recollection of the facts themselves, he can, strictly speaking, neither be examined nor cross-examined in reference to them. He has left the stand, and in his place is the unsworn statement, made at a time when there was no opportunity for cross-examination. The cases are in conflict upon the admission of papers where they do not serve to refresh the recollection. It must be conceded that there are many cases of difficulty, where it is hard to distinguish between independent recollection excited by a paper and conviction of the truthfulness of its statements, induced by circumstances connected with it. Especially do these cases arise where the facts contained in the paper are of a formal and routine character. In such cases the courts have been disposed to give a liberal construction to the "refreshing of memory." Doubtless this accords with a practical and business-like administration of justice where commercial and business matters are involved.

Closely allied to these cases are those where the existence of the memorandum itself, when taken in connection with circumstances shown to have attended its making, is a piece of circumstantial evidence of the facts stated. For example, where a memorandum or entry is made as a part of the regular routine of business, and it is shown that there was a routine followed

which, on the happening of fact A, would require the making of an entry, then the very fact that the entry exists, and was made by the proper person at the proper time, is circumstantial evidence of the fact to which it relates. In such cases, though the witness be unable to recollect the happening of the fact, there is good ground for the admission of the memorandum.[16] The witness' testimony that he knows the fact happened because he made the memorandum is superfluous. Such statement adds little, if any, to the force of the inference which the jury itself must draw from the circumstances proved.

But the courts have in some instances gone a step further, and, arguing from the cases above referred to, without a due consideration of the real reason for the admissibility of the evidence, have reached the conclusion that a witness may testify to facts stated in a writing shown him in connection with the introduction of the paper, though he have no recollection of the facts, and the circumstances surrounding the making of the writing are not shown to be such as make it circumstantial evidence.[17]

[16] It is mainly on cases of this character that Greenleaf bases his statement of the doctrine with reference to this subject, though they scarcely justify the form in which he states it. He says, in enumerating the classes of cases where writings may be used (1 Greenl. Ev. § 437): "(2) Where the witness recollects having seen the writing before, and though he has now no independent recollection of the facts mentioned in it, yet he remembers that at the time he saw it he knew the contents to be correct. * * * (3) Where the writing in question neither is recognized by the witness as one which he remembers to have before seen, nor awakens his memory to the recollection of anything contained in it, but, nevertheless, knowing the writing to be genuine, his mind is so convinced that he is on that ground enabled to swear positively as to the fact."

[17] Haven v. Wendell, 11 N. H. 112; State v. Rawls, 2 Nott & McC. (S. C.) 331. Such, also, was the case of Martin v. Good, 14 Md. 398, 74 Am. Dec. 545, where, upon the question of the terms of an agreement between partners, a clerk was permitted to testify from a memorandum which he testified was in his handwriting, though he had no recollection of the facts stated in the memorandum, or of the circumstances under which he made it; he having testified that he would not have written anything that was not right, and had no doubt the paper contained a correct statement. The court, in reaching its conclusion, relied upon Greenleaf's statement of the doctrine, quoted in note 16, and also upon such cases as Maugham v. Hubbard,

SAME—ADMISSIBILITY OF PAPERS USED TO REFRES RECOLLECTION.

245. In the case of papers used to refresh the recollection th general doctrine is that the papers themselves mu be produced for inspection and cross-examination the witness thereupon, and that they may be admi ted in evidence where the witness cannot testify e tirely independently of them.

The prevailing doctrine is that the court, jury, and couns should be permitted to inspect any paper which the witness us to aid him in the giving of his testimony.[18] In the interest fair play, a witness should not be permitted to refresh his mem ory while on the stand, unless opposing counsel has the op portunity to cross-examine him as to the method by which h does it. Then, too, testimony given under such circumstance will be apt to be misconceived by the jury unless they have be fore them the paper to which the witness has referred, an concerning which he has been cross-examined. While pape used to refresh recollection are ordinarily produced and in spected at the time of the witness' use of them, it is not alway that they have been permitted to be made a part of the evidenc in the case. The distinction, in its practical results, is rathe a shadowy one. A paper before the court and jury while th witness is being examined and cross-examined, and which ha been made the subject of such examination, is not likely to mis lead the jury if admitted in evidence as explanatory of the wit ness' testimony. It has been held, however, that when the wit ness has an independent present recollection the paper will no be admitted,[19] while, if his present recollection is uncertain an

8 Barn. & C. 14, and Merrill v. Railroad Co., 16 Wend. (N. Y.) 58 30 Am. Dec. 130, in both of which the question arose as to entrie the making of which was, in itself, circumstantial evidence. In th latter case the entry was one made in the regular course of busines

[18] Steph. Dig. Ev. art. 137; Peck v. Valentine, 94 N. Y. 569, pe Andrews, J. (page 571); Cortland Mfg. Co. v. Platt, 83 Mich. 419, 42 47 N. W. 330; McKivitt v. Cone, 30 Iowa, 455.

[19] Vicksburg & M. R. R. v. O'Brien, 119 U. S. 99, 102, 7 Sup. C 118, 30 L. Ed. 299; Peck v. Valentine, 94 N. Y. 569; Kelsea Fletcher, 48 N. H. 282; Taft v. Little, 178 N. Y. 127, 70 N. E. 211

indefinite without the use of the paper, and he therefore testifies from his conviction as to the correctness of the paper, it will be admitted.[20]

DECEPTION OF COURT BY WITNESS.

246. In case a witness is guilty of deceiving the court, his testimony may be disregarded.

The way in which a question of this sort usually arises is in reference to the capability of the witness to understand or speak the English language. A witness desiring to give false testimony would find it a great advantage to have the delay incident upon the employment of an interpreter. The question of the necessity of an interpreter is one which the court must decide upon the statement of the witness himself. If the court knows that the witness can speak English, although the witness denies it, he may refuse to allow an interpreter. If, however, the witness deceives the court in this respect, and the deception is afterwards discovered, the only remedy is by rejecting the testimony entirely.

DIRECT EXAMINATION.

247. The initial examination of a witness by the party calling him is known as the direct examination. The direct examination must cover all of the facts which the party expects to elicit from the witness.

The examination of a witness takes the shape of successive questioning, first by the party producing him, and then by the

Bailey v. Warner, 118 Fed. 395, 55 C. C. A. 329; Welch & Co. v. Greene, 24 R. I. 515, 54 Atl. 54. In this case the witness was allowed to use copies, since they were not to be introduced, but only to refresh the mind.

[20] Halsey v. Sinsebaugh, 15 N. Y. 485; State v. Jordan, 110 N. C. 491, 14 S. E. 752. In People v. McLaughlin, 150 N. Y. 365, 392, 44 N. E. 1017, the rule is stated as follows: "An original entry or a memorandum made by a witness at the time of a transaction is admissible in evidence as auxiliary to his testimony only when without its aid he is unable to distinctly recollect the fact to which it relates." Volusia County Bank v. Bigelow, 45 Fla. 638, 33 South. 704.

opposing party. The parties thus alternate in eliciting facts. Theoretically each party is supposed to complete his examination at one time; a single witness is to be questioned by the party whose case he is called to support until all the desired facts have been brought out, and then taken in hand by the opposing party for the purpose of cross-examination. As a matter of fact, a witness rarely leaves the stand without several further stages having been added to his examination. The human mind is not built on lines which make it possible to systematize the examination of a witness to a degree that will cover every point in a satisfying way upon a single questioning. The cross-examination in almost every case brings out matter requiring further explanation, or suggests matters omitted in the direct examination, which should be put before the jury. The result is that the witness is usually examined again by the party producing him, and frequently alternately by the opposing parties for a number of times. In the ordinary case we have the direct and cross-examination, a redirect examination, and a recross-examination; and quite frequently the alternate questioning is prolonged through several further stages without characterizing them by any special name.

LEADING QUESTIONS.

248. Upon the direct examination of a witness leading questions will not be allowed.

The rule respecting leading questions is one of the most frequently applied of any of the rules governing the conduct of the examination of witnesses. A leading question means what its name indicates,—one which leads the witness up to the desired answer; i. e., one which is put in such a way as to suggest to the witness the answer which is expected or wanted.[21] There is no particular form which will make a question leading, or will save it from being such. The fact that a question is put

[21] 1 Greenl. Ev. § 434; People v. Mather, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122, opinion of Marcy, J. (pages 247-249, of 4 Wend.); Osborn v. Forshee, 22 Mich. 209; Prather v. Railroad Co., 221 Ill. 190, 77 N. E. 430.

so as to require a categorical answer does not necessarily make it leading, though it may do so; nor does the fact that a question is prefaced by "whether or not," so as to avoid a categorical answer, save it from being leading.[22]

SAME—APPLICATION OF RULE.

249. The rule against leading questions only applies where the examination relates to material facts.

Leading questions may be put in the preliminary examination of a witness for the purpose of bringing him quickly to the matters in issue.[23] The use of leading questions for this purpose is a matter of convenience. There can be no possible harm in suggesting to the witness the preliminary, and sometimes merely formal, matter which every witness is usually desired to state, such as residence, occupation, business relations, connection with the suit and parties, and then bringing his mind to bear on the particular line of facts concerning which he is called to testify.[24] This is, therefore, allowable; always, however, subject to the discretion of the judge as to the proper limitations.

SAME—IN CASE OF HOSTILE WITNESS.

250. Where it is necessary to call a witness known to be hostile to the party calling him, the rule forbidding leading questions does not apply.

[22] Best, Ev. § 641; Willis v. Quimby, 31 N. H. 485, 490. In People v. Mather, supra, the following question was held to be leading: "State whether or not you, in substance or effect, addressed the defendant as one of those concerned in the transaction." It was then changed to "How did you address the defendant in respect to his being one of the persons concerned," and still held to be leading.

[23] Cheeney v. Arnold, 18 Barb. (N. Y.) 434, 438; Hopper v. Com., 6 Grat. (Va.) 684.

[24] In De Haven v. De Haven, 77 Ind. 236, the following question was allowed, as merely directing the witness' attention to the subject about which his testimony was desired: "State what you know if anything about your father ever recognizing Betsy, that afterwards married Davis and afterwards Hamilton, as his child."

The examination of an adverse party sometimes becomes necessary, in which case it need not be confined to the limits of the ordinary direct examination. As such a witness will not be disposed to state anything favorable to his opponent, if he can help it, it is allowable to elicit the facts desired by the use of leading questions.[25] In fact, the examination under the circumstances partakes of the character of a cross-examination. The relaxation of the rule is usually carried to the extent of allowing such questions in any case where the witness appears to be generally hostile, whether or not a necessary witness, and whether or not he was known to be hostile when called. A witness who, on the stand gives his testimony in a manner at variance with his statement of the facts made before trial to the party calling him becomes a hostile witness, and, though not a necessary witness, if the party was justified in calling him, and has done so in good faith, he will not be bound to adhere to the ordinary rules of direct examination.[26] And even in the examination of a friendly witness, where he seems to have forgotten some material point, it may be suggested to his mind in the form of a leading question.[27]

[25] In Becker v. Koch, 104 N. Y. 394, 401, 10 N. E. 701, 58 Am. Rep. 515, it is said: "An adverse witness may be cross-examined, and leading questions may be put to him by the party calling him, for the very sensible and sufficient reason that he is adverse, and that the danger arising from such a mode of examination by the party calling a friendly or unbiased witness does not exist." See, also, Brubaker's Adm'r v. Taylor, 76 Pa. 83.

[26] State v. Benner, 64 Me. 267, 280; Severance v. Carr, 43 N. H. 65; Bradshaw v. Combs, 102 Ill. 428, 434; Zilver v. Graves Co., 106 App. Div. 582, 94 N. Y. Supp. 714.

[27] Moody v. Rowell, 17 Pick. (Mass.) 490, 28 Am. Dec. 317, per Shaw, C. J. (page 498, of 17 Pick.); Huckins v. Insurance Co., 31 N. H. 238, 247. In Herring v. Skaggs, 73 Ala. 446, the question of the metal of which a safe was represented to be made becoming material, and a witness having testified that during the negotiations for the sale of the safe he was present, and heard the agent state what the metal was, and at the same time saw him exhibit a piece of the metal, but could not state the name by which the agent called the metal, the following question was permitted: "Was the name, by which Stewart called the metal, 'spiegel eisin'?" It has been held that children of tender years who are put upon the stand should not be asked leading questions, even where such questions would be permitted in case of adults, on the ground that they are much more

IMPEACHING ONE'S OWN WITNESS.

251. A party, upon the examination of his own witness, cannot ask questions for the purpose of discrediting his testimony.

252. Nor can he impeach his testimony by evidence from any other witnesses, either as to veracity or previous inconsistent statements.

253. But he may prove any material fact in the case by other witnesses, even though the effect be to contradict his own witness.

It is a well-recognized principle that one who offers a witness presents him as worthy of belief.[28] Upon this is founded the rule which forbids a party from impeaching his own witness. It has always been recognized, however, that the rule is a loose one, and subject to many exceptions, to be applied by the court in its discretion, where it will tend to the preservation of a proper attitude between parties and their witnesses. In other words, where a witness is honest, and acting in entire good faith towards the party producing him, the mere fact that he does not testify to the facts as expected, or that he remembers the facts differently at the trial than he has previously stated them, does not justify the party in seeking to show that he is false, or unworthy of belief. What the court requires is that the party shall place the same faith in his witness that he asks on the part of the court; and unless it is apparent to the court that the conduct of the witness in the trial justifies the inference that he has intentionally deceived the party calling him, and is taking an unfair advantage of his position, the rule will be enforced.[29] A party cannot, therefore, seek to strengthen

likely to be misled, and to answer as suggested by the questions. Coon v. People, 99 Ill. 368, 39 Am. Rep. 28.

[28] 1 Greenl. Ev. § 442. In Cross v. Cross, 108 N. Y. 628, 15 N. E. 333, the plaintiff called the defendant as a witness. While it was held that the plaintiff was not bound, on account of making him his own witness, by all the facts to which he testified, it was said by the court that the plaintiff could not have introduced testimony to impeach his testimony.

[29] State v. Burks, 132 Mo. 363, 369, 34 S. W. 48; McDaniel v. State, 53 Ga. 253; People v. Jacobs, 49 Cal. 384.

the testimony of a witness at the trial by showing by him that he has made previous statements to the same effect as his testimony.[30] It may happen that the witness has made previous statements which are inconsistent with his testimony as given at the trial. These cannot be shown either by questioning the witness himself as to them or by calling other witnesses.[31] There is, however, nothing in the rule which prevents a party from proving his case in the ordinary way, and, if one witness swears to facts which it is necessary for a party to prove otherwise to support his case, he may always do so. It is true that the incidental effect of this is to contradict his own witness, but this is not the purpose of the proof, and as long as it is material upon issues in the case it is admissible.[32] There are cases where a party has been permitted to call a witness' attention to previous statements made by him inconsistent with his present testimony. This is where it is done for the purpose of suggesting to the witness' mind the facts as he has previously stated them, in order to refresh his memory, and thus get at the truth.[33]

[30] Deshon v. Insurance Co., 11 Metc. (Mass.) 199, 209.

[31] Sanchez v. People, 22 N. Y. 147; People v. Safford, 5 Denio (N. Y.) 112; Com. v. Welsh, 4 Gray (Mass.) 535; Fisher v. Hart, 149 Pa. 232, 24 Atl. 225; Howard v. State, 32 Ind. 478; In re Kennedy's Estate, 104 Cal. 429, 38 Pac. 93.

[32] Thompson v. Blanchard, 4 N. Y. 303, 311; Hall v. Houghton, 37 Me. 411; Olmstead v. Winsted Bank, 32 Conn. 278, 85 Am. Dec. 260; Rockwood v. Poundstone, 38 Ill. 199; Perry v. Massey, 1 Bailey (S. C.) 32; Clapp v. Peck, 55 Iowa, 270, 7 N. W. 587; Melhuish v. Collier, 15 Adol. & E. (N. S.) 878, 889, per Coleridge, J. In Perry v. Massey, supra, the facts were as follows: A. sued X. for money loaned. X. alleged payment. On the trial X. called W., the agent of A., to prove payment to him as agent. W. unexpectedly testified that the payment made to him was on account of another debt. X. was then permitted to show by other witnesses that W. had previously admitted that the payment was on account of the debt to A. Mississippi Glass Co. v. Franzer, 143 Fed. 501, 74 C. C. A. 135.

[33] Bullard v. Pearsall, 53 N. Y. 230; Hildreth v. Aldrich, 15 R. I. 163, 1 Atl. 249; Howard v. State, 32 Ind. 478; Hall v. Chicago, R. I. & P. Ry. Co., 84 Iowa, 311, 316, 51 N. W. 150; Melhuish v. Collier, 15 Adol. & E. (N. S.) 878, 887. In Bullard v. Pearsall, supra, M., a witness, was called by the plaintiff to prove that a certain conversation took place between witness and defendant prior to the 17th of July. To the plaintiff's surprise, M., testified that the conversation took place on July 24th. The plaintiff may ask the witness if he

Where honestly surprised by his own witness a party may use 1, 2 & 4 (previous page) but not 3 [illegible] to the witness. Method 2, still doubtful. Flat rule is that 2 cannot be used, but tendency is to permit it.

Such line of examination is carefully guarded and will not be allowed to degenerate into hostile examination to contradict the witness.[34]

SAME—EXCEPTION TO RULE.

254. In the examination of an adverse or necessary witness it is the better opinion that evidence may be offered to impeach his veracity.

This is in line with the suggestion above set forth, and, while it is not universally accepted, it seems correct on principle. In many kinds of cases where facts necessary to the proving of a party's case are solely within the knowledge of an adverse party, such as in many cases where fraud is charged, a party might often be left with no means of proving his case if he were confined to the limitations of an ordinary direct examination, and were precluded from questioning the statements made by the witness.[35] It is all a question of what is fair and right for best

did not, on a prior occasion, say the conversation took place prior to the 17th. Hunt v. City of Boston, 152 Mass. 168, 25 N. E. 82; Stearns v. Merchants' Bank, 53 Pa. 490. Compare with this case People v. Safford, 5 Denio (N. Y.) 112, where, on a prosecution of X. for illegally selling liquor, B. was called as a witness by the prosecution, having testified before the grand jury that he had purchased brandy from X. on several occasions. B. having failed to give his testimony on the trial as expected, and having stated that he did not recollect purchasing any liquor from X., the prosecution was permitted to ask him, and to prove by him, what he testified to before the grand jury. It was held that this was erroneous, as the only purpose of the question and the effect of the evidence was to discredit the witness. See, however, Villineuve v. Railway Co., 73 N. H. 250, 60 Atl. 748, where a deposition taken previously stated facts opposite to the testimony given on the stand by witness, and it was held error not to allow examination of witness as to the facts stated in deposition.

[34] People v. Safford, 5 Denio (N. Y.) 112; Hall v. Railway Co., 84 Iowa, 311, 316, 51 N. W. 150.

[35] In Becker v. Koch, 104 N. Y. 394, 10 N. E. 701, 58 Am. Rep. 515, the action was by A., as assignee, against X., the sheriff, to recover possession of property covered by the assignment, which X. had seized under an attachment. X. claimed the assignment was fraudulent as to creditors. X. called M., the assignor, as a witness, and

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CROSS-EXAMINATION.

The power of cross-examination has been justly said to be one of the principal, as it certainly is one of the most efficacious, tests, which the law has devised for the discovery of truth. By means of it, the situation of the witness with respect to the parties, and to the subject of litigation, his interests, his motives, his inclinations and prejudices, his means of obtaining a correct and certain knowledge of the facts, to which he bears testimony, the manner in which he has used those means, his powers of discernment, memory, and description, are all fully investigated and ascertained, and submitted to the consideration of the jury, before whom he has testified, and who have thus had an opportunity of observing his demeanor, and of determining the just weight and value of his testimony. It is not easy for a witness, who is subjected to this test, to impose on a court or jury; for however artful the fabrication of falsehood may be, it cannot embrace all the circumstances to which a cross-examination may be extended.
Greenleaf. Section 446, (15th Edition.)

statement sought to be contradicted relates to a material part of the case, otherwise the parties might be involved in a long series of proof and counter proof respecting the contradictory statements of witnesses, which would tend only to obscure the real issues in the case, and to unduly prolong the trial.[41] The test of whether a witness' statement is material, so as to be subject to contradiction by the witnesses of the opposite party, is to inquire whether it relates to matter which such party would be permitted to give in evidence as a part of his case.[42]

In the introduction of evidence for the purpose of showing self-contradiction there is a rule that the witness whom it is sought to contradict should be asked on his cross-examination whether or not on such an occasion he made the contradictory statement.[43] This lays the foundation for the subsequent testimony that the witness did make such statement in case witness denies having made it. It also gives the witness a fair opportunity to explain his position if there is any explanation he desires to make.

CROSS-EXAMINATION.

257. Every witness whose direct examination is taken is subject to cross-examination.

The right of cross-examination of a witness is a very important means towards bringing out the truth of the facts testified to. Every witness is subject to cross-examination.[44] But the mere calling and swearing of a witness without proceeding

[41] Attorney General v. Hitchcock, 1 Exch. 91; Morgan v. Insurance Co., 6 W. Va. 496.

[42] See opinion of Pollock, C. B., in Attorney General v. Hitchcock, 1 Exch. 91, 98.

[43] Gaffney v. People, 50 N. Y. 416, 423. Compare with Sloan v. Railroad Co., 45 N. Y. 125. See, also, to same effect, Wilkins v. Babbershall, 32 Me. 184.

[44] Steph. Dig. Ev. art. 126; 1 Greenl. Ev. (15th Ed.) § 446. But upon the preliminary examination of a witness, to determine whether his evidence is competent to go before the jury, there is no right of cross-examination. The preliminary examination is theoretically conducted by the court, though counsel for one of the parties may be directed to conduct it. Com. v. Morrell, 99 Mass. 542.

with his testimony does not give the right to the other side to cross-examine.[45] Although the right to cross-examine is thus considered an absolute right reserved to the party against whom the testimony of any witness is offered, it does not follow that the exercise of the right will always be judicious, or of advantage. It is well to remember that the average person is only rendered more clear in his ideas and certain in his convictions by opposition. A hostile examination, therefore, in the majority of cases, only strengthens the testimony of the witness. Very few witnesses who are put upon the stand have any intention to falsify, and in the case of truthful witnesses cross-examination is a help to clearness of testimony. A careful discrimination in determining to what extent and upon what witnesses it will be best to exercise the right is necessary.

A witness whose testimony has not strengthened the case of the party calling him, or who has given an incomplete or unsatisfactory statement of the facts, had much better be allowed to go without cross-examination than to be placed in a position where he can strengthen his testimony. Cross-examination necessarily opens the door to re-examination, and the oppor-

[45] Toole v. Nichol, 43 Ala. 406; Austin v. State, 14 Ark. 555, 563. Stephen, in his Digest of the Law of Evidence (article 126), says that, whenever a witness has been intentionally sworn, the opposite party has a right to cross-examine him. No authorities, however, are cited for this statement. It is not probable that the rule would be enforced to this extent, for it frequently is a practice to swear all of the witnesses, which the one side or the other expects to call, at the same time, and it is hardly to be thought that the court would consider the administration of the oath as sufficient ground for allowing the opposite party to cross-examine. But see Turnbull v. Richardson, 69 Mich. 400, 37 N. W. 499, where in the opinion the following statement will be found (page 416 of 69 Mich., and page 507 of 37 N. W.): "In England the rule is that when any witness has been examined in chief, or has been intentionally sworn, the opposite party has a right to cross-examine him, except when the witness was called merely to produce a document on a subpœna duces tecum, or in order to be identified; and this rule has been substantially adopted in Massachusetts and other of the American states. It has been substantially acted upon in practice in this state. * * * It is therefore no reason for rejecting or striking out the cross-examination of a witness that he has not given any testimony in chief, or that his testimony in chief has been stricken out."

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SAME—SCOPE OF CROSS-EXAMI

258. The cross-examination, according to
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[46] Turnbull v. Richardson, 69 Mich. 400, 416, 37

[47] See People v. Cole, 43 N. Y. 508, 512, wher
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W. 13; Pringle v. Pringle, 59 Pa. 281, 290.

[48] Bradley v. Mirick, 91 N. Y. 293. Having on
to cross-examine, he cannot later exercise the rig
ler, 135 Mich. 384, 97 N. W. 754.

the disadvantage of such party. The questions then arise, will the opposing counsel be permitted on cross-examination to bring out such unfavorable matter, and will the testimony be treated as the testimony of the other party? It is obvious that if this course may be pursued it will be of tremendous advantage to the cross-examiner, for he may pursue all the methods allowed on cross-examination, and will be subject to none of the limitations imposed upon an examination of his own witness. The English courts have said that such a course may be adopted, and that cross-examination of a witness may extend to all matters material to the case.[49] The doctrine generally adopted by the American courts is contra, and confines the cross-examination to such matters as have been gone into on the examination in chief.[50] Under this doctrine, if the cross-examination extends beyond the grounds covered in the direct examination, the witness becomes the witness of the party cross-examining. The testimony brought out binds him as though he had called the witness himself, and in bringing it out he is confined to the methods of the direct examination.[51]

[49] Steph. Dig. Ev. art. 127.

[50] People v. Court of Oyer & Terminer of New York Co., 83 N. Y. 436, 459; State v. Smith, 49 Conn. 376, 380; Donnelly v. State, 26 N. J. Law, 463, 494; Fulton v. Central Bank, 92 Pa. 112; Bell v. Chambers, 38 Ala. 660, 664; City of Aurora v. Cobb, 21 Ind. 492, 511; Hurlbut v. Meeker, 104 Ill. 541; Krager v. Pierce, 73 Iowa, 359, 35 N. W. 477; Buckley v. Buckley, 14 Nev. 262; Lawder v. Henderson, 36 Kan. 754, 14 Pac. 164; People v. Miller, 33 Cal. 99; Houghton v. Jones, 1 Wall. (U. S.) 702, 17 L. Ed. 503. See contra, and in accord with English doctrine, Blackington v. Johnson, 126 Mass. 21; Kibler v. McIlwain, 16 S. C. 550, 556; People v. Barker, 60 Mich. 277, 302, 27 N. W. 539, 1 Am. St. Rep. 501; Mask v. State, 32 Miss. 405, 427.

[51] Finch, J., says, in People v. Court of Oyer & Terminer of New York Co. (cited in preceding note), as to the right to put leading questions to a witness upon cross-examination as to matter not gone into on the examination in chief: "As to the new matter, the witness becomes his own, and, in substance, and effect, the cross-examination ceases. That is properly such only while it is directed to the evidence given in behalf of the adversary. When it passes beyond that, it becomes the direct and affirmative evidence of the party, and should be subjected to the appropriate restraints. There is no reason in the nature of the case why a direct examination should be guarded against the evil and danger resulting from lead-

The manner and extent of cross-examination are largely within the discretion of the presiding judge.[52]

SAME—SCOPE UNLIMITED IN RESPECT TO CREDIBILITY.

259. The scope of the cross-examination is not limited when directed to the credit of the witness.

The purpose of the cross-examination is to test the truthfulness, candor, intelligence, memory, bias, or interest of the witness, and any question to that end within reason is usually allowed.[53]

There is no distinction between the American and English cases in respect to this rule. The fact that a question may tend to disgrace the witness is no objection to it, provided it is fairly directed towards testing the veracity of the witness.[54] A witness may be asked whether he has been in prison for crime;[55]

ing questions which do not apply to an effort upon cross-examination to introduce a new and affirmative defense. See, also, Sullivan v. Railroad Co., 175 Pa. 361, 365, 34 Atl. 798; Prather v. Railroad Co., 221 Ill. 190, 77 N. E. 430; Quigley v. Thompson, 211 Pa. 107, 60 Atl. 506.

[52] Taylor v. Schofield, 191 Mass. 1, 77 N. E. 652; Thompson v. U. S., 144 Fed. 14, 75 C. C. A. 172.

[53] Briggs v. People, 219 Ill. 330, 76 N. E. 499.

[54] Real v. People, 42 N. Y. 270, 280; Muller v. St. Louis Hospital Ass'n, 5 Mo. App. 390, 401; City of South Bend v. Hardy, 98 Ind. 577, 49 Am. Rep. 792; Wroe v. State, 20 Ohio St. 460, 470. The fact that a man deserted from the army has been held to have no bearing on his credibility (Gulf, C. & S. F. Ry. Co. v. Johnson, 83 Tex. 628, 19 S. W. 151); nor the fact that he has no religious belief (People v. Copsey, 71 Cal. 548, 12 Pac. 721); nor the fact that he visited saloons, drank and played cards (Hayward v. People, 96 Ill. 492, 502). It is to be observed that, in case of questions put tending to bring out disgraceful acts on the part of the witness, the witness may, if the answer will tend to criminate him, assert his privilege of refusing to answer; but subject to this qualification the field is unlimited.

[55] Com. v. Bonner, 97 Mass. 587; Spiegel v. Hays, 118 N. Y. 660, 22 N. E. 1105. It is held in Michigan that a witness may be asked if he has been indicted or arrested for crime (Wroe v. State, 20 Ohio St. 460, 470; People v. Foote, 93 Mich. 38, 52 N. W. 1036); but the New York doctrine, to the effect that mere indictment or arrest for

in case of a witness who was a Catholic priest, whether he was not married after his ordination;[56] whether the witness has been in a conspiracy to defraud an insurance company;[57] and other questions of similar character. As preliminary to the cross-examination of a witness as to the facts in the case, it is common practice to make inquiry into his relations with the party on whose behalf he was called,—business, social, and family; also to inquire as to his feelings towards the party against whom his testimony has been given. This is permissible in order to place his testimony in a proper light with reference to bias in favor of the one party or prejudice against the other.[58]

SAME—LEADING QUESTIONS ON CROSS-EXAMINATION.

260. In the cross-examination of a witness leading questions are permissible.

It is one of the advantages in cross-examination that the facts may be put, in questions asked the witness, in the light in which the party cross-examining wishes them to appear, and the witness' "Yes" or "No" requested as to their correctness. When the difficulty of getting a witness to give the facts properly and in such manner as will be most impressive is considered, this advantage will be appreciated. By the leading question a witness may often be surprised into an admission of the truth of facts which he has denied on direct examination. Leading questions are permitted upon all matters in reference to which the witness may be cross-examined. In those jurisdictions

crime without subsequent conviction cannot be shown, seems the better, People v. Crapo, 76 N. Y. 288, 32 Am. Rep. 302; People v. Cascome, 185 N. Y. 317, 78 N. E. 287. See People v. Eldridge, 147 Cal. 782, 82 Pac. 442; Code Civ. Proc. Cal. § 2051.

[56] Muller v. St. Louis Hospital Ass'n, 5 Mo. App. 390, 401.

[57] City of South Bend v. Hardy, 98 Ind. 577, 49 Am. Rep. 792.

[58] Schultz v. Railroad Co., 89 N. Y. 242; Gutterson v. Morse, 58 N. H. 165; State v. Montgomery, 28 Mo. 594. In State v. Montgomery, it was held that cross-examination as to witness' feelings towards the husband of the party cross-examining would not be allowed. The danger in this is set forth in the opinion in State v. Hill, 52 W. Va. 296, 43 S. E. 160.

where cross-examination is allowed as to the whole case, leading questions are permitted even though they relate to entirely new matter.[59]

SAME—SELF-CONTRADICTION.

261. A witness may be asked on cross-examination whether he has not made previous statements contradictory to his present testimony.

There are two purposes for which self-contradiction may be attempted to be shown upon the cross-examination,—one for the immediate effect it may have in reference to the credibility of the witness, as when the witness either admits the making of previous inconsistent statements or becomes so confused and uncertain as to create a bad impression; the other for the purpose of laying the foundation for the introduction of direct testimony showing that the witness has made such contradictory statements on prior occasions.[60] The denial of the witness is, of course, a condition precedent to proceeding with such testimony.[61] It is also held that no direct testimony can be introduced to show a self-contradiction on the part of the witness unless the statement relates to a material fact.[62] This is not saying that in the cross-examination itself a witness may not be interrogated as to previous statements upon collateral facts, but only that his denial will furnish no foundation for further testimony on the point, unless it relates to material facts. It

[59] Moody v. Rowell, 17 Pick. (Mass.) 490, 28 Am. Dec. 317.

[60] Welch v. Abbot, 72 Wis. 512, 515, 40 N. W. 223.

[61] People v. Walker, 140 Cal. 153, 73 Pac. 831. But it was held in Peck v. Ritchey, 66 Mo. 114, 119, that when the witness testified that he did not know whether he did or did not make the statement, it could be proved that he had made it. To the same effect, see Cole v. State, 6 Baxt. (Tenn.) 239.

[62] Carpenter v. Ward, 30 N. Y. 243; Alexander v. Kaiser, 149 Mass. 321, 21 N. E. 376; Smith v. Town of Royalton, 53 Vt. 604; State v. Goodwin, 32 W. Va. 177, 9 S. E. 85; State v. Crouse, 86 N. C. 617; Shields v. Cunningham, 1 Blackf. (Ind.) 86; Com. v. Hourigan, 89 Ky. 305, 311, 12 S. W. 550; Dillard v. United States, 141 Fed. 303, 72 C. C. A. 451.

is held that the veracity and bias of a witness are relevant to the issue.[63]

Another condition to the introduction of further testimony showing contradictory statements is that in the cross-examination the circumstances of time and place of the making of such alleged contradictory statements must be put before the witness with sufficient clearness to identify the occasions.[64] The question of how far it is necessary to place the matter before the mind of the witness is one largely of discretion. The object to be attained is that the witness may have an "opportunity of making an explanation, in order that it may be seen whether there is a serious conflict or only a misunderstanding or misapprehension." With this in view, the court may vary the strict course of examination.[65] Where the statement about which he is asked is in writing, it is necessary that his attention be called to the writing, and, if he denies that he made such statement, the writing must be proved in the ordinary way. If he admits he made it, it may, of course, be read in evidence in contradiction of his previous testimony.[66] The fact that the

[63] Day v. Stickney, 14 Allen (Mass.) 255; Combs v. Winchester, 39 N. H. 13, 19, 75 Am. Dec. 203.

[64] Mattox v. U. S., 156 U. S. 237, 245, 15 Sup. Ct. 337, 39 L. Ed. 409; Hart v. Hudson River Bridge Co., 84 N. Y. 56; State v. Glynn, 51 Vt. 577; Unis v. Charlton's Adm'r, 12 Grat. (Va.) 484, 494; Matthis v. State, 33 Ga. 24; Lawler v. McPheeters, 73 Ind. 577; Campbell v. Campbell, 138 Ill. 612, 615, 28 N. E. 1080; State v. Grant, 79 Mo. 113, 49 Am. Rep. 218; Watson v. Railway Co., 42 Minn. 46, 43 N. W. 904; People v. Devine, 44 Cal. 452; McCamant v. Roberts, 80 Tex. 316, 15 S. W. 580, 1054.

[65] Church, C. J., in Sloan v. Railroad Co., 45 N. Y. 125, 127. In People v. Weldon, 111 N. Y. 569, 19 N. E. 279, M., a witness for the prosecution, was allowed to testify to a conversation with S., one of the defendant's witnesses. S. had testified that he had had no conversation with M., but he was not questioned as to the time, place, and subject of the conversation afterwards testified to by M. After M. had finished his testimony, the defendant put S. on the stand again, and asked him particularly as to the alleged conversation. The court held that by so doing the defendant had waived any objection to the testimony of M., and that, as all the testimony of both witnesses as to the alleged conversation was before the court, although not brought out in the ordinary way, there was no ground of exception.

[66] Gaffney v. People, 50 N. Y. 416, 423.

previous statement is in writing does not prevent cross-examination as to what the writing stated, nor necessitate the production of the writing. The purpose is not to prove the contents of the writing, but to prove that the witness made a statement inconsistent with his present testimony. There is no difference in the manner of cross-examination, whether it relate to previous oral or written statements.[67]

RE-EXAMINATION.

262. Further examination by a party of his own witn after cross-examination, is usually found nec and is known as re-examination or redirect e tion.

With the direct examination a party puts befor substantially all the facts which from his point of terial to support his case. After the witness ha by his adversary many facts may have been cross-examination which require further expl testimony to make the witness' testimony as and clear. On cross-examination only th been brought out which serve to weaken producing the witness and to favor the c

It may be that a witness has been correspondence, and only a part of as a single letter, has been used. O comes important that the whole c in, or it may have appeared that but the substance of the conver or some other condition equal mony is left at the close of ders some further examina

SAME—PURP

263. The sole object habilitate a new testim

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While the object of the re-examination is to reinforce the testimony already given by the witness upon his direct examination and to remove any obscurity or uncertainty left by the cross-examination by proper explanation, there is no strict rule which prevents a party from examining the witness as to new matters which have been overlooked or were not known about on the direct examination. It should also be noted that the purpose of re-examination is not to go over the facts brought out on direct examination in order to emphasize or impress those facts on the minds of the jury. The question as to what limits shall be placed upon re-examination is largely one of discretion.[68]

[68] Clark v. Vorce, 15 Wend. (N. Y.) 193, 30 Am. Dec. 53. Savage, C. J., delivering the opinion of the court, says: "It is the duty of counsel to examine a witness to his whole case when he calls him; but if counsel calls a witness who knows facts to sustain several points in his client's case, inadvertently omits to examine the witness to one point, until after he has been cross-examined, there is surely no reason in the policy of the law against a further examination. It may, perhaps, be inconvenient to the judge and opposing counsel, to enter into the further examination, but that is not a sufficient reason why the party calling the witness should be deprived of material testimony. It is not consistent with justice that a party should lose his cause because the testimony is not introduced with strict technical precision, or that it may possibly give additional trouble in taking notes of the testimony. It seems to me that too much pertinacity in a strict adherence to arbitrary rules is sometimes grasping the shadow, and letting go the substance. Justice is always best administered by a liberal indulgence to parties in the production and examination of their witnesses."

CHAPTER XIV.

WRITINGS.

264. Double Character of Writings.
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276. Production of Documents.
277–279. Authentication of Documents—Attested Documents.
280–281. When Proof by Attesting Witnesses Excused.
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284. Nature of Proof Required from Attesting Witnesses.
285. Unattested Documents.
286. Exceptions to Rule Requiring Proof of Execution.
287–288. Proof of Handwriting.
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291. By the Opinions of Experts.
292. By Comparison of Hands by Jury.
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294. Reason for Rule.
295. Validity of Instrument Questioned.
296. Collateral Oral Agreements.
297. Writing a Mere Memorandum.
298. Oral Evidence of Custom.
299. Writing Brought in Issue Collaterally.
300. Evidence as to Alterations.
301. Interpretation of Documents.
302. Receipts.

DOUBLE CHARACTER OF WRITINGS.

264. A writing may be treated as a physical object or as an operative thing, which, through its contents, speaks or acts, and is, therefore, evidentiary of something else.

A writing is ordinarily thought of as the physical expression of an idea, and not as a combination of paper and ink. Yet a writing may be looked at simply in the light of a physical object—an article which may be handled. As such it has no evidentiary force other than that possessed by a piece of paper. If its existence is a material question in the case, its production would be evidence (or rather proof) of that fact, just as the production of any article—for instance, a weapon or piece of clothing—the existence or condition of which was in question, would be satisfactory proof.

Writings may be dealt with in a broad sense as including all objects which by presentation to the physical senses of the jury may be said to "speak" concerning some disputed question of fact. In this sense a piece of clothing, an injured limb, a weapon, or other object used to enlighten the jury, may be classed as a writing. Articles exhibited to the senses of the jury are sometimes spoken of as "real" or "demonstrative" evidence. A few words as to their use may properly have place in this chapter.

PHYSICAL OBJECTS AS EVIDENCE.

265. Physical objects, as to the condition or existence of which there are disputed questions, or which may enable the jury to reach more accurate conclusions respecting issues in the case, may, in the reasonable exercise of discretion by the court, be received in evidence.

The extent to which the court may go in allowing the use of physical objects is not defined by any absolute rule or rules. The exercise of a reasonable discretion by the judge in this respect has generally been upheld, and there are few cases in which the misuse of such discretion has resulted in a reversal on appeal.[1]

[1] Jefferson Ice Co. v. Zwicokoski, 78 Ill. App. 646; Chicago & A. R. Co. v. Clausen, 173 Ill. 100, 50 N. E. 680. The use of a baby six weeks old upon the question of paternity was held to have been erroneous. Copeland v. State (Tex. Cr. App.) 40 S. W. 589. Another instance where it was held the court had exceeded its discretion in

There are, however, several features of the use of this class of evidence which should be noted. First, it is to be observed that there are two points of view from which objection to the evidence may be considered: The point of view of a party offering the evidence, and the point of view of a party seeking to compel its production.

The cases quite generally hold to the doctrine of a wide latitude in the receipt of evidence of this character, when offered voluntarily by either party. As serving to truthfully place before the jury the facts material to the case, it must be recognized that physical objects often play a very important part. Where they are offered, therefore, it seems quite proper that, unless there is some consideration of fairness or decency to prevent, they should be received.[2]

An entirely different phase of the subject is presented where production of this class of evidence is requested, and the court is asked to compel an unwilling party to comply with the request. Here the courts have quite generally held to a narrow application of their power in this respect. The question has arisen most often in cases where physical examination has been sought, and where the party has been unwilling to exhibit to the jury a wound or injury. In these cases the courts will rarely compel the exhibition of the injured member.[3]

An element in the use of this kind of evidence, which has often influenced the court in allowing its admission, is the ef-

allowing the introduction of this sort of evidence is found in Garvik v. Railway Co., 124 Iowa, 691, 100 N. W. 498.

[2] City of Topeka v. Bradshaw, 5 Kan. App. 879, 48 Pac. 751; Seltzer v. Saxton, 71 Ill. App. 229; McMahon v. City of Dubuque, 107 Iowa, 62, 77 N. W. 517, 70 Am. St. Rep. 143; Boucher v. Robeson Mills, 182 Mass. 500, 65 N. E. 819. A watch which had stopped, taken from the pocket of deceased after the accident, is a striking instance of the analogy of this kind of evidence to writings. Upon the issue of darkness, and whether the train was running on schedule time, the watch was held to be competent. Stone v. Railroad, 72 N. H. 206, 55 Atl. 359.

[3] Mills v. Railway Co., 2 Hardesty (Del.) 31; Grand Lodge, Brotherhood of Railroad Trainmen, v. Randolph, 186 Ill. 89, 57 N. E. 882; McKnight v. Railway Co., 135 Mich. 307, 97 N. W. 772. But in Chicago, R. I. & T. R. Co. v. Langston, 19 Tex. Civ. App. 568, 48 S. W. 610, the court held that, where the plaintiff had exhibited her wounds to the jury, she could be compelled to allow examination

fect that it is likely to have in exciting or prejudicing the jury, by reason of arousing their sympathies or passions. This element alone has frequently been responsible for the refusal to receive evidence of this character.

A case of this sort arose in an action for personal injuries, where the attorney sought to introduce the amputated foot of the injured child for the alleged purpose of showing the size of the child at the time of the injury. The child itself was present at the trial, and the court very properly declined to receive the foot in evidence.[4]

ILLUSTRATIVE EVIDENCE.

266. Maps, diagrams, and photographs are admissible to explain or illustrate the testimony of a witness.

Writings, in the broad sense above mentioned, include also a second class of evidence, which in a sense may be said to be secondary to the demonstrative evidence just referred to; that is, treating the physical objects which may be brought into court as evidence as primary evidence, it is permitted,

of the wounds by experts of the defendant's selection. This seems a reasonable conclusion, and is really somewhat in the nature of a cross-examination of the witness.

[4] Rost v. Railroad Co., 10 App. Div. 477, 41 N. Y. Supp. 1069. Where the purpose for which the evidence was offered seemed legitimate—as, for example, the showing to the jury of the real character of an injury—the exhibition of an empty eye socket, even though it might tend to excite pity and sympathy, was held proper. Orscheln v. Scott, 90 Mo. App. 352. See, also, Perry v. Railway Co., 68 App. Div. 351, 74 N. Y. Supp. 1; West Chicago St. Ry. Co. v. Grenell, 90 Ill. App. 30. In Anderson v. Seropian, 147 Cal. 201, 81 Pac. 521, the preserved hand, which had been taken off by a roller on a printing press, was admitted for the purpose of showing, by a streak of ink on the hand, the portion of the machine by which the injury had been caused; and in another case amputated toes were held competent evidence upon the subject of the nature of the accident, though the court laid down the rule that the offer of such evidence must be for the purpose of proving some disputed fact material to the issue. Nebonne v. Railroad Co., 68 N. H. 296, 44 Atl. 521. In one case, upon the issue of paternity, a baby six weeks old was introduced, and on appeal the court held this to have been error. Copeland v. State (Tex. Cr. App.) 40 S. W. 589.

where it is impossible to present to the jury such primary evidence, to put before them maps, diagrams, and photographs, which will present to them the appearance and condition of physical things which may be material to the issues.

There are two ways in which this kind of evidence has been treated by the courts: The one, as explanatory or illustrative of the verbal testimony of a witness; and the other, as in itself constituting original evidence, in addition to and beyond such verbal testimony.

It is usually in the performance of the first function mentioned that we find maps and diagrams introduced, while in the case of photographs, if their explanatory nature is made use of, it is generally supplemented by the use of the photograph for the second purpose above mentioned.

The map, diagram, or photograph may have been made by the witness whose testimony it explains, or it may have been made by some other person.[5] In either case, so far as its illustrative or explanatory nature is concerned, the only essential is that it be offered in connection with the witness' verbal testimony, and may thus stand before the jury as a part of that testimony. The function it serves in this view is simply to present a condition or a group of objects, by the use of pictorial language, more clearly to the jury than could be done by the words of the witness. Take, for example, a case where a surgeon is attempting to describe to the jury the condition of a fracture of a bone in the human body; he can, by the use of a drawing or an X-ray photograph of the fracture in question, illustrate to the jury the exact location and nature of the injury more plainly and satisfactorily than in any other way. Such evidence is very generally admitted.[6]

[5] Koon v. Railway Co., 69 S. C. 101, 48 S. E. 86; Lake Erie & W. Ry. Co. v. Wilson, 87 Ill. App. 360.

[6] Bruce v. Beall, 99 Tenn. 303, 41 S. W. 445. In this case an X-ray photograph was admitted. Other instances of illustrative evidence of this character are found where maps have been introduced, Jordan v. Duke, 6 Ariz. 55, 53 Pac. 197; diagram of a track and car, with indication of injured party's position, Clegg v. Railway Co., 159 N. Y. 550, 54 N. E. 1089; Southern Pac. Co. v. Hall, 100 Fed. 760, 41 C. C. A. 50; photograph of a wreck, Denver & R. G. Ry. Co. v. Roller, 100 Fed. 738, 41 C. C. A. 22, 49 L. R. A. 77; enlarged photograph

The use of diagrams, pictures, or photographs in this explanatory way is attended with little difficulty so far as the principles of evidence are concerned. They are brought forward either by the witness or in connection with his testimony, and, if it sufficiently appears to the court that they would be helpful, they are, as shown by the cases cited, quite generally admitted. The sole principle involved is that of helpfulness in making the testimony clear. Where it does not appear that they would be of service in this way, and that the verbal testimony is itself sufficiently clear, they may be excluded.[7]

PICTORIAL EVIDENCE AS ORIGINAL EVIDENCE.

267. Photographs and other forms of pictorial representation are, when properly authenticated, admissible as evidence of the things represented.

Evidence of this kind in the second aspect above mentioned, namely, as original evidence justifying inferences beyond the verbal testimony given as to the facts represented, is in a sense a substitute for the view of the place or objects in controversy, which the jury is in many cases permitted to have.

It was an old principle which permitted the jury to be taken to the scene of the act or happening under consideration, to view the surroundings and thus have ocular evidence which would help them to reach a correct conclusion. This sort of thing was more effective when the processes of the law moved quickly and little time elapsed between the event which formed the subject of the trial and the trial itself. With the lapse of time incidental to the establishment of more complicated machinery of justice, which took place between the happenings complained of and their investigation by a trial, a personal view became less and less practicable. It was then that

of writing to illustrate the testimony of experts, Howard v. Saving Bank, 189 Ill. 568, 59 N. E. 1106; a survey, Pickering Light & Water Co. v. Savage, 137 Cal. 19, 69 Pac. 846; drawing made by witness before the jury, Lake St. Elevated R. R. v. Burgess, 200 Ill. 628, 66 N. E. 215.

[7] Cirello v. Express Co. (Sup.) 88 N. Y. Supp. 932.

the custom of putting before the jury pictorial or photographic representations of circumstances, surroundings, conditions, and objects bearing upon the subject of controversy assumed a wider development, and certain principles grew up applicable to the use of this class of evidence.[8]

SAME—AUTHENTICATION.

268. Pictorial evidence is only admissible when properly authenticated as a correct representation of the things portrayed.

Whether the evidence offered consists of maps, diagrams, drawings, pictures, and photographs, ordinary or X-ray, the first essential is that the thing offered shall be properly authenticated. The value of a piece of evidence of this character is entirely dependent upon its being a correct representation or a reproduction of the original, and verbal testimony must therefore be offered by some one who knows the circumstances under which it was produced, and who can testify that it is a correct representation of what it purports to be. Testimony of this kind is usually given by the person who made the drawing, diagram, or map, or who took the photograph and developed and printed it. Such person may know nothing of the facts in issue, and be unable, as an independent witness, to give material testimony; but, assuming that the origi-

[8] A curious conclusion was reached in the case of People v. Thorn, 156 N. Y. 286, 50 N. E. 947, 42 L. R. A. 568. In the course of a murder trial the jury were permitted to take a view of the premises where the murder was committed. The prisoner, at his own request, did not accompany the jury, and, when the verdict of guilty was rendered, he raised, on appeal, the objection that he had not been present through the whole trial. The court, in its manifest desire not to stamp the trial as a nullity, came to the conclusion that the view was not to be considered as part of the trial, on the theory that the "knowledge acquired by the jury in inspecting the premises was to enable them to better understand the evidence and not to obtain original testimony." But the theory that a view is in the nature of a piece of real evidence, such as a weapon or other article submitted to the jury for inspection, seems the more reasonable one. For a comment on the case cited, see 12 Harvard Law Rev. 212.

nal of the representation which is produced in court is material, the witness is able to supply the authentication which makes the representation admissible.[9] The subject at issue may be the condition of a street at the time of an accident,[10] the situation of land with respect to the grade of a street,[11] the circumstances of a collision of railway trains,[12] the location of a stump which frightened a horse,[13] the character of an injury to the person,[14] or any one of many similar subjects which may conveniently lend themselves to the photographic process; and in all these cases the use of photographs is of daily occurrence in the courts, where the necessary testimony as to the correctness of the photograph is at hand.[15] The exclusion of such testimony, where the requirements for its admission are fully satisfied and it would be particularly helpful to the jury, in view of the conflict of verbal testimony, will be held to be error.[16]

If, however, there is not sufficient evidence as to correctness, the photographs will be excluded.[17]

SAME—MATERIALITY.

269. Pictorial evidence is only admissible when the condition or objects represented are themselves competent and material evidence.

[9] Hyde v. Town of Swanton, 72 Vt. 242, 47 Atl. 790.

[10] Miller v. City of New York, 104 App. Div. 33, 93 N. Y. Supp. 227.

[11] Village of Grant Park v. Trah, 115 Ill. App. 291; Id., 218 Ill. 516, 75 N. E. 1040.

[12] Maynard v. Navigation Co., 46 Or. 15, 78 Pac. 983, 68 L. R. A. 477.

[13] City of Huntington v. Lusch, 33 Ind. App. 476, 70 N. E. 402.

[14] People's Gaslight & Coke Co. v. Amphlett, 93 Ill. App. 194.

[15] Tish v. Welker, 7 Ohio N. P. 472; Village of Grant Park v. Trah, 115 Ill. App. 291; Id., 218 Ill. 516, 75 N. E. 1040; Miller v. Dumon, 24 Wash. 648, 64 Pac. 804; First Nat. Bank v. Wisdom's Ex'rs, 111 Ky. 135, 63 S. W. 461.

[16] Lake Erie & W. R. Co. v. Wilson, 189 Ill. 89, 59 N. E. 573.

[17] Cunningham v. Railroad Co., 72 Conn. 244, 43 Atl. 1047; Iroquois Furnace Co. v. McCrea, 91 Ill. App. 337.

Under this head properly comes the principle which requires that the situation or objects which are put before the jury by the use of photographs must have been in the same condition at the time the photographs were taken as they were at the time of the happening of the event in controversy. In other words, a condition which existed prior to or subsequent to the time in question would not be a material or competent piece of evidence, and therefore a photograph showing such condition is equally incompetent. If, however, the condition existing prior or subsequent is by collateral testimony shown to be the same as that existing at the time of the event, then a photograph taken at such prior or subsequent time becomes admissible, and the time which has elapsed between the date of the photograph and the date of the event under consideration is immaterial.[18]

It follows from the above that, where a piece of evidence of this character has been put in, testimony with respect to change or identity of conditions is admissible.[19]

It is on this principle that a photograph of an artificially reproduced situation will not be received. It has sometimes been attempted to get before the jury the circumstances of an accident by endeavoring to reproduce, in part, at least, the relative location of the objects and persons concerned, and then to take a photograph. The courts have held, however, that such photograph would not be received.[20]

If, however, it is not shown that conditions are the same, then, no matter how little time has elapsed, the photograph is valueless as evidence, and will be excluded.[21]

[18] Hyde v. Town of Swanton, 72 Vt. 242, 47 Atl. 790; People's Gaslight & Coke Co. v. Amphlett, 93 Ill. App. 194.

[19] Town of Waterbury v. Traction Co., 74 Conn. 152, 50 Atl. 3.

[20] Stewart v. Railroad Co., 78 Minn. 110, 80 N. W. 855; Babb v. Paper Co., 99 Me. 298, 59 Atl. 290.

[21] In Harris v. City of Quincy, 171 Mass. 472, 50 N. E. 1042, the photograph was taken of a sidewalk upon the morning following the accident. The accident was caused by ice, and it was held that, it not appearing that the ice was in the same condition as at the time of the accident, the photograph might be excluded. Chicago & A. Ry. Co. v. Corson, 101 Ill. App. 115; Id., 198 Ill. 98, 64 N. E. 739.

SAME—ACCESSIBILITY OF THINGS REPRESENTED.

270. Pictorial evidence is not admissible where the original objects are before or accessible to the jury.

A third essential to the admissibility of photographs is that they shall serve to put before the jury facts which the jury itself cannot personally view, and therefore, where the original situation or object which the photograph seeks to reproduce is before the jury, the photograph is inadmissible. Where, for instance, the jury has personally viewed the premises, it is proper to exclude photographs.[22]

The admission of evidence of this character is largely within the discretion of the court, whose duty it is to pass upon the evidence offered to bring it within the principles of admissibility above stated.[23]

Where the evidence is likely to unduly authorize the sympathy of the jury, or where considerations of decency are involved, the court will very frequently decline to receive photographs.[24]

It is always permissible for the opposing party to offer testimony to discredit, explain, or weaken the effect of photographs or other evidence of this character.[25]

[22] Dobson v. City of Philadelphia, 7 Pa. Dist. R. 321; Baxter v. Railway Co., 104 Wis. 307, 80 N. W. 644; Clary-Squire v. Publishing Co., 58 App. Div. 362, 68 N. Y. Supp. 1028.

[23] Frith v. Frith, Prob. 74 (Eng.); Lake Erie & W. R. Co. v. Wilson, 87 Ill. App. 360.

[24] Selleck v. City of Janesville, 104 Wis. 570, 80 N. W. 944, 47 L. R. A. 691, 76 Am. St. Rep. 892; Guhl v. Whitcomb, 109 Wis. 69, 85 N. W. 142, 83 Am. St. Rep. 889.

[25] De Forge v. Railroad Co., 178 Mass. 59, 59 N. E. 669, 86 Am. St. Rep. 464. In this case, upon the subject of the extent of an injury to a brakeman's left foot, an X-ray picture of both feet was admitted in evidence. The picture was printed from a glass plate, upon which was marked in lead pencil the letters "R." and "L." The defense offered to show that the X-ray placed the right foot on the right side of the plate and the left foot on the left side, and that in printing sensitized paper the objects would be reversed, and that, therefore, the picture claimed to be a picture of the left foot was in reality a picture of the right foot. This evidence was excluded, and it was held error.

WRITINGS IN NARROW SENSE.

271. Writings in the narrower sense are seldom dealt with as physical objects in their use as evidence.

It is rather as the embodiment of certain operative acts of parties, or as the statement of that which has previously existed, that they are taken up. A will and a deed, for instance, are in themselves operative; they act; by reason of their existence that which belongs to one party passes to another. The questions which arise with respect to the use of documents as evidence are many and various. Of what are they evidence? What is sufficient proof of their authenticity or identification? How far may their contents be introduced? How may their production in court be compelled? These are a few of the matters which have occupied the attention of the courts in connection with writings.

BEST EVIDENCE RULE.

272. A writing is the best evidence of its own contents, and must be introduced unless it has been lost or destroyed, or its absence is otherwise satisfactorily accounted for.[26]

In its modern application, the best evidence rule amounts to little more than the requirement that the contents of a writing must be proved by the introduction of the writing itself, unless its absence be satisfactorily accounted for. In its origin the rule known as the "best evidence" was something entirely different. In fact it related to all classes of evidence, and was a broadening, rather than a narrowing, rule. It meant that the best evidence of which the nature of the case would permit was receivable. It has been pointed out by a learned writer that this rule has been the subject of a very peculiar development.[27] As now understood, the rule is one

[26] Lynch v. Clerke, 3 Salk. 154.

[27] Thayer, in his Cases on Evidence (2d Ed. p. 778), describes it as follows: "During the latter part of the seventeenth century and

relating to writings only. It extends to all writings, however, and is not confined to those which relate to matters required by law to be in writing.[28]

To the statement that the rule extends to all writings there must be a slight qualification. Where the writing to be proved consists of a notice, there it is held that the rule does not apply, and that the contents may be proved by a copy, without effort to get the original. A notice of dishonor of a note, notice to quit by landlord to tenant, an attorney's bill (in England), are some illustrations of this qualification.[29] It some-

the whole of the eighteenth, while rules of evidence were forming, the judges and text writers were in the habit of laying down two principles, namely: (1) That one must bring the best evidence that he can; and (2) that, if he does this, it is enough. These principles were the beginnings in the endeavor to give consistency to the system of evidence before juries. They were never literally enforced; they were principles, and not exact rules; but for a long time they afforded a valuable test. As rules of evidence and exceptions to the rules became more definite, the field for the application of the general principle of the 'best evidence' was narrower. But it was often resorted to as a definite rule and test in a manner which was very misleading. This is still occasionally done, as when we are told in McKinnon v. Bliss, 21 N. Y. 218, that 'it is a universal rule, founded in necessity, that the best evidence of which the nature of the case admits is always receivable.' * * * Always the chief example of the 'best evidence' principle was the rule about proving the contents of a writing. But the origin of this rule about writings was older than the 'best evidence' principle, and that principle may well have been a generalization from this rule, which appears to be traceable to the doctrine of profert. That doctrine required the actual production of the instrument which was set up in pleading. In like manner it was said, in dealing with the jury, that a jury could not specifically find the contents of a deed unless it had been exhibited to them in evidence. And afterwards when the jury came to hear testimony from witnesses it was said that witnesses could not undertake to speak to the contents of a deed without the production of the deed itself."

[28] 1 Greenl. Ev. (15th Ed.) §§ 87, 88.

[29] Quinley v. Atkins, 9 Gray (Mass.) 370. In Morrow v. Com., 48 Pa. 305, 308, the notice was a supervisor's notice to remove obstructions. In Gethin v. Walker, 59 Cal. 502, 506, the notice was a notice of rescission of contract. As to attorney's bill, see Colling v. Treweek, 6 Barn. & C. 394, 398. In Eisenhart v. Slaymaker, 14 Serg. & R. (Pa.) 153, 156, Gibson, J., gives the reason for the rule in respect to notices as follows: "Every written notice is, for the best

times happens that there are a number of duplicates of the same document, as in case of placards, newspapers, etc. In such case, to prove the contents any one of the several copies is admissible.[30] Where the writing is not in issue, but merely collateral to it, it is held that the rule has no application, and parol evidence may be given, even though it covers the contents of the writing.[31]

An interesting question arises where the allegations that a book or documents do not contain certain matter. It has been held here that oral testimony of any one who has examined the writing may be given in support of the allegation. In a certain sense the writing itself may certainly be regarded as the best evidence of what it does not contain, as well as what it does contain, yet there may not be the same difficulty in establishing that a certain matter is not contained in a writing as in determining with exactness its actual contents, and there

of all reasons, to be proved by a duplicate original; for, if it were otherwise, the notice to produce the original could be proved only in the same way as the original notice itself, and thus a fresh necessity would be constantly arising ad infinitum to prove notice of the preceding notice, so that the party would at every step be receding instead of advancing."

[30] Rex v. Watson, 2 Starkie, 116, 129. So, also, where a contract is executed in duplicate, either is admissible. Cleveland & T. R. Co. v. Perkins, 17 Mich. 296, 299. A carbon copy, made at the same time as a letter, has been held admissible, without notice to produce, as being a duplicate original. Chesapeake & O. R. R. Co. v. Stock. 104 Va. 97, 51 S. E. 161. In a comment upon this case in 19 Harvard Law Rev. 123, it is suggested that the same rule, relating to carbon copies, should be extended to letterpress copies, and that both should be allowed to be introduced as primary evidence.

[31] Coonrod v. Madden, 126 Ind. 197, 25 N. E. 1102. In this case suit was brought on a promissory note, and the defense was payment. The defendant proved the giving of a check to plaintiff, and the plaintiff was allowed to testify, under objection, that the check was received by him in payment of another note, giving the date and amount of the note, rate of interest, etc., which note he had surrendered to defendant. No notice to produce had been given. This was held proper, the appellate court saying (page 199, 126 Ind., and page 1102, 25 N. E.): "The rule which requires the production of written instruments in evidence has no application when the instrument is merely collateral to the issue, and where the fact to be proved relates to a subject distinct from the writing." Ledford v. Emerson, 138 N. C. 502, 51 S. E. 42.

may, therefore, be less reason for the enforcement of the best-evidence rule.[32]

An interesting question arises in respect to the character of such things as tags, cards, or small articles with names or inscriptions upon them, where a few words only are used. If they are regarded as writings, the best evidence rule applies; while, if they are treated as things, their existence, appearance, contents, etc., may be proved in the ordinary way by oral testimony.[33]

There is a distinction between proving a fact which has been put in writing and proving the writing itself. Because a fact has been described in a writing does not exclude other proof of the fact.[34] For example, the proceedings of a corporate meeting of stockholders or directors are facts. They are ordinarily reduced to writing in the minutes of the meeting. Yet they may still be proved by independent oral testimony.[35]

It is the same with proof of the testimony of a witness upon a former trial. The stenographer's minutes are not the only evidence which may be given. Oral evidence of a person who was present at the trial and heard the testimony is admissible.[36]

But, suppose the dispute be as to the minutes themselves; then the writing becomes the best evidence of what the minutes

[32] McPhelemy v. McPhelemy, 78 Conn. 180, 61 Atl. 477.

[33] See Reg. v. Farr, 4 Fost. & F. 336, where an inscription on a ring was not allowed to be described orally. But in Rex v. Hunt, 3 Barn. & Ald. 566, inscriptions on flags and banners were allowed to be described, and in Com. v. Morrell, 99 Mass. 542, oral testimony of the writing on a valise tag was received.

[34] A tenancy is a fact. It is a relation created by an agreement; and the agreement may be in writing; yet this does not preclude oral proof of the fact of tenancy. Rex v. Inhabitants of Holy Trinity, 7 Barn. & C. 611. But see, contra, Doe v. Harvey, 1 Moore & S. 374, 378. Receipt of money or goods is a fact which can be proved by parol, although a written receipt may have been given. Jacob v. Lindsay, 1 East, 460; Steele v. Lord, 70 N. Y. 280, 26 Am. Rep. 602; Kingsbury v. Moses, 45 N. H. 222.

[35] Rex v. Hunt, 3 Barn. & Ald. 566, 572. Contra, Dawson v. Town of Orange, 78 Conn. 96, 61 Atl. 101.

[36] Weinhandler v. Brewing Co., 46 Misc. Rep. 584, 92 N. Y. Supp. 792. But see Estes v. Railroad Co., 111 Mo. App. 1, 85 S. W. 909.

are, and must be produced. Upon the cross-examination of a witness, as has been said in the preceding chapter, questions may be put as to the contents of writings previously made by the witness, and inconsistent with the present testimony of the witness, without the production of the writings themselves. The purpose being to lay a foundation for the subsequent contradiction of the witness by proof of the writings, the cross-examination is only preliminary, and the best evidence rule does not apply.[37]

SAME—ORIGINAL DOCUMENTS REQUIRED.

273. When the best evidence rule is applicable, the original document only satisfies its requirement, except—EXCEPTION—In the case of public documents and records, when exemplified copies are received.

The best evidence required by the rule means the original document. If compliance with the rule be not excused in some way, its requirements are strictly enforced, and no substitute will be allowed for the original.[38] Neither a letterpress copy nor a photograph will be received. It is meant, of course, that such copies will not be received if it appears that there is no good excuse for not producing the original.

The inconvenience of bringing public records into court, and their accessibility for the purpose of comparison and correction of copies, led to the practice of receiving exemplified copies wherever it became necessary to prove them in evidence,[39] and statutory provisions usually provide the manner in

[37] Ante, pp. 412, 413.

[38] Foot v. Bentley, 44 N. Y. 166, 171, 4 Am. Rep. 652.

[39] Lynch v. Clerke, 3 Salk. 154. From Marsh v. Collnett, 2 Esp. 665, we take the following: "Lord Kenyon said they were public books, which public convenience required should not be removed from place to place, and, though the books were in court, he would not, for the sake of example, break in upon a rule founded on that principle of public convenience, and require the production of the original, but admit a copy from them in evidence." The books referred to were Bank of England records of stock transfers, and the originals happened to be in court. See, also, Mann v. Carey, 3 Salk. 155.

which such copies may be obtained and used.[40] The practice thus substitutes the exemplified copy for the original,[41] and the best evidence rule applies with even more strictness to such copy than to the original in the case of other writings, for the reason that the law does not recognize any excuse for failure to produce an exemplified copy. Such copy can always be obtained, and, if one be lost, another can be procured. Hence a duly examined and compared copy is always required.[42]

When the proof relates to public statutes in foreign jurisdictions, the question may come up in such manner that oral testimony may be competent. If the question be as to the text of the statute, then, of course, the rule is applicable; but, if it be as to the statutory law,—i. e., the statute as interpreted by the courts—the oral testimony of an expert becomes admissible.[43]

SAME—WHEN SECONDARY EVIDENCE ADMISSIBLE.

274. Failure to produce the original may be excused by proof that it has been lost or destroyed, is out of the jurisdiction of the court, or is in the hands of the adverse party, who has failed to produce it on demand duly made.

The loss or destruction of a writing, if satisfactorily shown, opens the door for the admission of secondary evidence as to its contents. If loss be claimed, it must be shown that diligent search has been made, and every reasonable effort exhausted to

[40] See Rev. St. U. S. § 882 et seq. [U. S. Comp. St. 1901, p. 669], and Code Civ. Proc. N. Y. tit. 4 (Documentary Evidence) §§ 921-956.

[41] Doe v. Ross, 7 Mees. & W. 102, per Lord Abinger, C. B., page 106.

[42] Hill v. Packard, 5 Wend. (N. Y.) 375, 387.

[43] American Life Insurance & Trust Co. v. Rosenagle, 77 Pa. 507, 515; The Pawashick, 2 Lowell (U. S.) 142, Fed. Cas. No. 10,851. See, also, Hill v. Packard, 5 Wend. (N. Y.) 375, 384. But see Traders' Nat. Bank v. Jones, 104 App. Div. 433, 93 N. Y. Supp. 768, where, under the statute (section 942, Code Civ. Proc.) providing for proof of a foreign statute by introduction of an authorized publication, it was held that parol evidence was inadmissible.

find it.[44] If destruction be the excuse, and it is sufficiently proved that the writing is no longer in existence, secondary evidence is at once admissible.[45] Destruction at the instance or by the hand of the party offering the proof is not sufficient unless reasonable cause be shown for his destroying it.[46] The question of what will be satisfactory proof of the loss or destruction of a writing is a preliminary one for the court, and the matter is largely one of discretion. Proof of reasonable effort to find it, or of probable destruction, is sufficient.[47] If the writing is out of the jurisdiction of the court, and not under the control of the party offering the proof, so that it cannot be reached by subpœna duces tecum, secondary evidence is admissible.[48] Where it is in the hands of the adverse party, all that is required in order to lay the foundation for secondary evidence is reasonable demand on him to produce it.[49]

[44] Saltern v. Melhuish, Amb. 247, per Lord Chancellor Hardwicke, page 248. The rule is stated as follows in Kearney v. Mayor, etc., of City of New York, 92 N. Y. 617, 621, by Rapallo, J.: "The general rule is that the party alleging the loss of a material paper, where such proof is necessary for the purpose of giving secondary evidence of its contents, must show that he has in good faith exhausted to a reasonable degree all the sources of information and means of discovery which the nature of the case would naturally suggest, and which were accessible to him." See, also, Elwell v. Cunningham, 74 Me. 127.

[45] For one of the early cases, see Medlicot v. Joyner (1669) 2 Keb. 546, where the original was burned. This case is printed in Thayer, Cas. Ev. (2d Ed.) p. 780. See Graton v. Holliday-Klotz Co., 189 Mo. 322, 87 S. W. 37.

[46] Blade v. Noland, 12 Wend. (N. Y.) 173, 27 Am. Dec. 126; The Count Joannes v. Bennett, 5 Allen (Mass.) 169, 81 Am. Dec. 738.

[47] Mason v. Libbey, 90 N. Y. 683; Elwell v. Mersick, 50 Conn. 272, 275. See, also, remark of Lord Ellenborough, 29 How. St. Tr. 437, trial of Mr. Justice Johnson, quoted in Thayer, Cas. Ev. (2d Ed.) p. 791.

[48] Binney v. Russell, 109 Mass. 55; Mauri v. Heffernan, 13 Johns. (N. Y.) 58, 73.

[49] For one of the earliest cases, see Bradford's Case (1633), case 24 in Clayton's Reports and Pleas of Assizes at York (page 15), also printed in Thayer, Cas. Ev. (2d Ed.) p. 780. See, also, Com. v. Emery, 2 Gray (Mass.) 80; British American Ins. Co. v. Wilson, 77 Com. 559, 60 Atl. 293. The nature of the action as shown in the pleadings is held sufficient notice in certain cases, as, for example, where it is brought

The notice to produce is required for the benefit of the parties to whom the notice is given, and the fact that such party cannot be compelled to testify is no reason for dispensing with the notice.[50]

A notice to produce is the usual form, but an immediate demand in open court, where it appears the document is in court, is deemed sufficient.[51] A somewhat different question arises where the writing is in the possession of a third person, and such person, on being served with a subpœna duces tecum, refuses to produce it. Where the third person has some legal right to the document, which renders his refusal proper, or where he refuses on the ground that the document might tend to criminate him, it is held that secondary evidence is allowable, since the party has done all in his power to have the original produced;[52] and there seems to be no good reason why the doctrine should be different when the third person contumaciously refuses to produce the document. Punishment for contempt or an action for damages against the witness would be poor compensation to the party injured by the witness' refusal. Where an admission of the contents of the document by the adverse party can be shown, there, if the character of an admission be considered, it would seem the best evidence rule should not apply. An admission, in this case, as it is in any other, is a fact which excuses proof. There is, however, some difference among the authorities in this country as to allowing proof of admission of contents.[53]

It will be noted that in the case of a writing which cannot

to foreclose a mortgage. In such case the defendant need not give notice to the plaintiff to produce the mortgage. Howell v. Huyck, 2 Abb. Dec. (N. Y.) 423; Wabash R. Co. v. Johnson, 114 Ill. App. 545.

[50] The conclusion reached in State v. McCauley, 17 Wash. 88, 49 Pac. 221, while contrary, it is submitted, is erroneous.

[51] Dwyer v. Collins, 7 Exch. 639, 646. Writings which have been called for and refused cannot be used afterwards by the party refusing to produce them. Gage v. Campbell, 131 Mass. 566.

[52] Doe v. Ross, 7 Mees. & W. 102, per Parke, B., page 121; Mills v. Oddy, 6 Car. & P. 728, 732.

[53] As to the English rule where admissions are received, see Slatterie v. Pooley, 6 Mees. & W. 664. To the same effect is Smith v. Palmer, 6 Cush. (Mass.) 513. Contra, Sherman v. People, 13 Hun (N. Y.) 575.

be produced because of one of the reasons above specified, there is a preliminary matter to be attended to before secondary evidence becomes admissible. This is proof of the actual existence of the writing at a former time. Proof of the loss, destruction, or other facts relied upon as an excuse for failure to produce does not always involve proof of the existence in the sense in which the court requires it.[54] If the previous existence of a document is not questioned, evidence of a diligent search for it is sufficient to let in secondary evidence. If, however, it be denied that the writing ever existed, either in fact or in law, a question is presented which requires certainty of proof before proof of the contents can be introduced.[55] Where the writing is one under which parties to the suit claim rights, as in case of a contract, deed, or will, the contents must be proved with certainty, or the courts cannot give effect to the instrument, even if its previous existence be sufficiently proved.[56]

SAME—KINDS OF SECONDARY EVIDENCE.

275. Where the production of the original document is excused, any sort of secondary evidence which is relevant and competent is allowed. There are no degrees of secondary evidence.

Where the circumstances are such that secondary evidence may be introduced, a question arises as to what sort of secondary evidence will be allowed. It has been said that where there are different kinds of secondary evidence the best class

[54] 1 Greenl. Ev. (15th Ed.) § 558, note 1.

[55] Newell v. Homer, 120 Mass. 277, 283, was a case where it was sought to prove a lost will, but the evidence of the existence of such a will at the time of the testator's death was so slight that the court refused probate of copies offered. See, also, Brown v. Brown, 8 El. & Bl. 876. In a very early case (Rex v. Culpepper [1696] Skin. 673) Holt, C. J., says: "Though in the case of a deed lost or burnt they would admit a copy or counterpart or the contents to be given in evidence, yet they never permitted it except it be proved there was such a deed executed." See Carpenter v. Jones, 76 Ark. 163, 88 S. W. 871.

[56] Davis v. Sigourney, 8 Metc. (Mass.) 487.

must be produced;[57] but the impracticability of classifying this sort of evidence seems sufficient for not extending the principle of the rule beyond the original writing.[58] It does not follow, however, that the door will be opened to evidence that is uncertain or unreliable. While there is no general rule which will exclude any particular class of evidence, it must appear to be of a kind that will fairly justify belief.[59] A copy of a press copy of a letter has been allowed where it appeared that a copy was a correct transcript.[60]

PRODUCTION OF DOCUMENTS.

276. The production of documents may be compelled by the court—

(a) When they are in the hands of a third person, by the subpœna duces tecum. Disobedience may be punished as contempt of court.

(b) When in the hands of a party to the suit, by a subpœna duces tecum, or by an order to produce. Disobedience may be punished as a contempt of court. Secondary evidence may be introduced, and the offending party deprived of the subsequent use of the document as evidence.

If we suppose that a document becomes material to the issues in an action, the first question which arises is as to how it may be obtained. Let it be, for instance, in the hands of a third party, it must first be brought into court before it can be used. The law has always provided a way of compelling the production of a document in court, as it has of compelling the

[57] See note 2 to section 84 in 1 Greenl. Ev. (15th Ed.).

[58] Goodrich v. Weston, 102 Mass. 362, 3 Am. Rep. 469; Cameron v. Peck, 37 Conn. 555; Doe v. Ross, 7 Mees. & W. 102. But see Cornett v. Williams, 20 Wall. (U. S.) 226, 246, 22 L. Ed. 254, where the United States Supreme Court refused to go to the length of holding there were no degrees of secondary evidence.

[59] Hearsay evidence will not be allowed. In Nichols v. Kingdom Iron Ore Co., 56 N. Y. 618, evidence of a witness who had heard another party read the instrument was held inadmissible.

[60] Goodrich v. Weston, 102 Mass. 362, 3 Am. Rep. 469. But see Ford v. Cunningham, 87 Cal. 209, 25 Pac. 403, where other evidence was refused, it being shown that press copies were in existence.

attendance of a witness. The subpœna duces tecum directed the witness to produce the document. The enforcement of the command lay in the power of the court to punish disobedience as a contempt.[61] If the document, therefore, was known to be in the hands of a third party, its production was an easy matter. Suppose, however, that it was in the hands of the other party to the suit; the court could then summarily order its production, or could issue a subpœna in the usual way.[62] If the document was not produced under the order of the court or under a notice to produce served by the adversary, the party failing to produce it lost the benefit of the best evidence rule; that is, he could not insist upon proof of the contents of the document by the document itself, but secondary evidence was allowed.[63] In addition to this, the court might and frequently did refuse to allow the offending party to use the document in support of his own case.[62] Added to this was the further fact that refusal to produce a document called for might be commented on by the opposing counsel, and the jury legitimately infer that its contents were unfavorable to the interests of the party withholding it.

AUTHENTICATION OF DOCUMENTS—ATTESTED DOCUMENTS.

277. There are two kinds of documents which are recognized by the law in respect to the manner of authentication—attested and unattested.

278. An attested document must be proved by the attesting witness.

279. An unattested document must be proved by testimony as to the handwriting of the maker.

The introduction in evidence of a writing is not accomplished when the document is produced in court. There is still

[61] Bull v. Loveland, 10 Pick. (Mass.) 9, 14.

[62] The subpœna duces tecum at the present day is used indiscriminately whether the document be in the hands of a third person or of a party, and either would be equally liable to punishment for contempt for failure to obey. Dunn v. N. Y. Edison Co., 46 Misc. Rep. 602, 92 N. Y. Supp. 787.

[63] Ante, p. 432, note 51.

a preliminary matter to be attended to before the writing can be received. This is the authentication of the writing, or the proof of its genuineness.[64] With respect to proof of this kind, documents have been divided into two classes—those which are attested, and those which are not. The common law made a difference in the proof of the genuineness of the two classes, requiring in the former case proof of the attestation, while in the latter proof of the execution alone was necessary, or, indeed, possible.[65] In the case of attested documents the rule was very strict that authentication must be by putting on the stand the attesting witnesses, or one of them.[66] Even if the party himself who executed the instrument was present in court, he was not permitted to prove the document.[67] Where there were several witnesses to the same instrument, it was held sufficient if one of them was produced.[68] By statutory provision a great many instruments which at common law required attestation have been made valid without attesting witnesses. Usage has, however, caused parties to continue to add the attestation, and a new question has thereby been raised as to authentication of a document which is not required to be attested, but which in fact has been executed in the presence of attesting witnesses. There seems to be no settled rule with respect to the manner of proof under such circumstances. In Massachusetts it would seem that the attestation may be disregarded, and that the instrument may be proved in the ordinary way.[69]

[64] Stebbins v. Duncan, 108 U. S. 32, 44, 2 Sup. Ct. 313, 27 L. Ed. 641.

[65] 2 Tayl. Ev. § 1839.

[66] Omychund v. Barker, 1 Atk. 21, 49; Rex v. Inhabitants of Harringworth, 4 Maule & S. 350; Abbot v. Plumbe, 1 Doug. 216; Brigham v. Palmer, 3 Allen (Mass.) 450; Ellis v. Smith, 10 Ga. 253, 261; 1 Greenl. Ev. § 569. Some early cases are referred to and extracts printed in Thayer, Cas. Ev. (2d Ed.) pp. 735–739.

[67] Brigham v. Palmer, 3 Allen (Mass.) 450.

[68] White v. Wood, 8 Cush. (Mass.) 413.

[69] Shaw, C. J., in Amherst Bank v. Root, 2 Metc. (Mass.) 522, at page 533, says, referring to a document which became material, and was offered in evidence: "It being an instrument not requiring attestation to give it legal effect as an instrument, it would be sufficient to prove the fact of execution by any competent evidence."

SAME—WHEN PROOF BY ATTESTING WITNESSES EXCUSED.

280. Where attesting witnesses cannot be produced for reasons which the court regards as sufficient, other proof will be allowed.

281. Their absence will be considered satisfactorily explained when it is shown that they are all
- **(a) Dead,[70] or**
- **(b) Insane,[71] or**
- **(c) Without the jurisdiction of the court,[72] or that**
- **(d) After diligent search they cannot be found, or are unknown.[73]**

The above are the principal cases of disability on the part of attesting witnesses upon proof of which the courts hold secondary evidence admissible. The matter is one largely of discretion, to be exercised upon the facts as they may appear in each particular case, and there are many other instances, not included in the above classes, where the peculiar circumstances have induced the court to permit secondary evidence of execution of documents.[74] It is held that the nonappearance of all of the attesting witnesses, if there are several, must be accounted for before any other evidence can be introducd.[75] As the testimony of one of several attesting witnesses is sufficient to prove the document, no other evidence can be allowed until it is shown to be impossible to produce any single one.[76] A peculiar question has arisen where an attesting

[70] Adam v. Kerr, 1 Bos. & P. 360; Stebbins v. Duncan, 108 U. S. 32, 2 Sup. Ct. 313, 27 L. Ed. 641.

[71] Neely v. Neely, 17 Pa. 227; Currie v. Child, 3 Camp. 283.

[72] Valentine v. Piper, 22 Pick. (Mass.) 85, 90, 33 Am. Dec. 715; Teall v. Van Wyck, 10 Barb. (N. Y.) 376; Jones v. Roberts, 65 Me. 273; Barnes v. Trompowsky, 7 Term R. 265, per Lord Kenyon, page 266.

[73] Woodman v. Segar, 25 Me. 90. In Keeling v. Ball, Peake, Add. Cas. 88, Lord Kenyon admitted secondary evidence where a bond had been lost, and the party did not remember who the subscribing witness was.

[74] See 1 Greenl. Ev. (15th Ed.) § 572, and notes.

[75] Jackson v. Gager, 5 Cow. (N. Y.) 383, 386.

[76] Stebbins v. Duncan, 108 U. S. 32, 45, 2 Sup. Ct. 313, 27 L. Ed. 641.

witness has been called, and, though admitting his signature, denies that he saw the execution of the instrument. In such case, will the party be precluded from introducing secondary evidence of the execution? It has been held that (to quote the language of an early case) "a man shall not lose his obligation because they have tampered with his witness, and he allowed the plaintiff to prove the obligation by comparison of hands." [77]

SAME—KIND OF EVIDENCE NECESSARY IN ABSENCE OF ATTESTING WITNESSES.

282. By the common law, if the attesting witnesses could not be produced, proof was required—First, of their handwriting, or that of one of them; and, second, of the handwriting of the maker.

283. The general rule in the United States at the present time considers proof of the handwriting of either the maker or attesting witness sufficient.

Where the absence of the attesting witnesses has been satisfactorily explained, it then becomes a question what other evidence will be allowed, and how much will be required to prove the execution of a document. There seems to have prevailed a notion that resort must first be had to proof of the handwriting of the subscribing witnesses, or at least one of them,[78] and, in the event of its being impossible to produce such evidence, then to proof of the execution by the maker. This doctrine does not appear to have been generally enforced as a strict rule; on the contrary, the courts have recognized indiscriminately both kinds of proof as sufficient.[79]

[77] Blurton v. Toon (1606) Skin. 639; Reinhart v. Miller, 22 Ga. 402, 416, 68 Am. Dec. 506.

[78] Gelott v. Goodspeed, 8 Cush. (Mass.) 411; Van Rensselaer v. Jones, 2 Barb. (N. Y.) 643. In Stebbins v. Duncan, 108 U. S. 32, 2 Sup. Ct. 313, 27 L. Ed. 641, at page 44, 108 U. S., and at page 321, 2 Sup. Ct. (27 L. Ed. 641), the court says: "As the witnesses to the deed were shown to be dead, the method pointed out by law to establish the execution of the deed was by proof of the handwriting of the witnesses to the deed, and where there was more than one witness proof of the handwriting of one was sufficient."

[79] In Gelott v. Goodspeed, 8 Cush. (Mass.) 411, 412, the court

In case of an instrument to the validity of which a subscribing witness is made necessary by law, it would seem that the proof would have to extend to proof of the handwriting of such witness.[80]

SAME—NATURE OF PROOF REQUIRED FROM ATTESTING WITNESSES.

284. Authentication by an attesting witness merely requires that such witness testify to the genuineness of his signature as a witness to the instrument.

The testimony of an attesting witness is largely a matter of form. Such witness need not know anything about the instrument itself. It is sufficient if he identifies his signature. When it is considered that the fact to be proved is not the contents of the document, but the fact that it was executed by the maker, it will be seen that the act of attestation is in itself evidence that the document was in existence and executed. That the witness purporting to sign actually did sign is therefore all the evidence which is necessary to authenticate the document.[81] Knowledge of the contents of the document on the part of the witness is immaterial.

SAME—UNATTESTED DOCUMENTS.

285. Where the document sought to be proved is not attested, the method of proof is simply to authenticate the handwriting of the maker.

If a writing has no subscribing witnesses, and is not of sufficient age to "prove itself," the signature of the maker

say: "We perceive no reason, assuming that a proper case for any secondary evidence was shown, why the proof of the handwriting of one witness to the deed was not quite sufficient to authorize reading the deed to the jury." In Troeder v. Hyams, 153 Mass. 536, 539, 27 N. E. 775, proof of the signature of the maker was held sufficient. See, also, Newsom v. Luster, 13 Ill. 175. See opinion of Erle, J., in Reg. v. Inhabitants of St. Giles, 1 El. & Bl. 642, 645.

[80] Newsom v. Luster, 13 Ill. 175, 185.

[81] But see Schaffer v. Emmons, 103 App. Div. 399, 92 N. Y. Supp. 993.

must be proved as preliminary to its introduction in evidence, or, in case of its being a document without signature, the writing must be identified as that of the person with whom it is sought to connect the paper.[82] It is not necessary to prove the date of the signing of the instrument, nor other circumstances of its execution. Proof of handwriting is sufficient to admit it in evidence,[83] though, of course, if its genuineness is attacked by evidence tending to show that it was antedated, or otherwise affected with fraud, the person offering it, to make it effective, would be obliged to introduce further evidence.

SAME—EXCEPTIONS TO RULE REQUIRING PROOF OF EXECUTION.

286. In the following cases proof of the execution of documents offered in evidence is not required:

(a) Ancient documents; i. e., of the age of 30 years or more.

(b) A document under which the adverse party claims an interest.

(c) In some jurisdictions, a document not directly involved in the issue.

(d) When proof is waived by the adverse party.

There are certain cases where documents have been admitted in evidence without formal proof of execution, either by attesting witnesses or other evidence. These are exceptions to the general rule. They will be taken up in the order enumerated in the statement above.

Ancient Documents.

The first exception is that of ancient documents. It has been loosely stated that a deed or other instrument 30 years or more old, which comes from a proper custody, "proves itself." If what is meant is that such document will be treated for all purposes as genuine without any proof to support it, then it may be emphatically said that there is no such rule. If what is meant is that the paper will be received in evidence for the consideration of the court or jury without compelling the par-

[82] 1 Greenl. Ev. (15th Ed.) § 569, note 1.

[83] Pullen v. Hutchinson, 25 Me. 249, 254.

ties to give the usual formal proof of execution by attesting witness or otherwise, then the statement finds a basis in the decisions.[84] Because a paper is received in evidence it is not to be conclusively regarded as genuine. Other evidence may show that it is a forgery, or that it was never intended to become operative; and the jury is at liberty to determine upon all the evidence to what weight it is entitled.[85] In this view of the matter there is no reason why any other proof should be required as a condition to its admissibility than that the document came from a proper custody. Other proof may be offered after the document is before the court, and will be either confirmatory of the genuineness of the deed or against it. Proof of possession or the enjoyment of any rights secured by the document belongs to this class of evidence, and, if offered, is properly admitted for the consideration of the jury. But it is scarcely logical to make it a condition to the admission of the document in evidence; and in those cases which have required this order of proof it will be found that the attention of the judges has been directed rather to the final question of genuineness to be passed upon by the jury upon all the evidence, than to the preliminary one to be determined by the judge before admitting the paper.[86]

[84] Village of Oxford v. Willoughby, 181 N. Y. 155, 73 N. E. 677.

[85] Gardner v. Granniss, 57 Ga. 539, 554; Harlan v. Howard, 79 Ky. 373. In this case, referring to the rules admitting ancient documents without proof of execution, Judge Hargis, for the court, says: "But we must be understood as applying these rules solely to the admissibility of the deed as evidence, and not to the weight of the evidence it affords. The strength and credibility of the evidence belong to the province of the jury, as they may, even after the deed shall be admitted, be convinced of its want of genuineness from other evidence that may come in during the progress of the trial."

[86] In Willson v. Betts, 4 Denio (N. Y.) 201, 213, Bronson, C. J., states the doctrine in reference to ancient deeds as follows: "But the mere fact that the instrument has existed for more than thirty years, unaided by other proofs, cannot be enough to establish it in a court of justice. In the ordinary affairs of men it is very often assumed without proof that he whose name has been affixed to a written instrument placed it there himself. But when the signing becomes a matter of legal controversy, it must be established by proof. And showing that the instrument is thirty years old has no

By proper custody is meant such custody as one would naturally expect to find it in. There is no one place, ordinarily, which is proper as against all others. It is sufficient if the circumstances of the possession in which the document is found are not such as to cast suspicion upon it, but are such as accord with an originally authentic execution of the document and a proper subsequent use of it.[87]

The common-law rule was that, even though an attesting witness to an ancient document be shown to be alive, he need not be called.[88] The 30-year period is computed from the time the deed is offered in evidence, and not from the commencement of the suit.[89]

Document under Which Adverse Party Claims an Interest.

The claim of an interest under a document is a distinct and positive recognition of its authenticity and validity, and really operates as a waiver of proof as to these points. There

greater tendency to prove it genuine than would the fact that it had existed for a single day. The mere fact of existence, whether the time be long or short, has no tendency whatever, in a legal point of view, to prove the due execution of the instrument. * * * It has sometimes been loosely said that where there are no circumstances of suspicion a deed thirty years old proves itself. But there is no just foundation, either in principle or authority, for such a dictum. * * * When possession has accompanied the deed, or other unequivocal acts have been done under it, then the longer it has existed the stronger is the presumption that it is genuine. But if the deed has never been put in use, and especially if the right it professes to give has been denied by an adverse possession, then the longer the deed has existed the stronger is the presumption that it is not a genuine instrument." Possession was held a condition of admissibility in Ridgeley v. Johnson, 11 Barb. (N. Y.) 527, 538; Homer v. Cilley, 14 N. H. 85, 98. Contra, Harlan v. Howard, 79 Ky. 373.

[87] 1 Greenl. Ev. (15th Ed.) § 142.

[88] Doe v. Wolley, 8 Barn. & C. 22; Jackson v. Blanshan, 3 Johns. (N. Y.) 292, 295, 3 Am. Dec. 485, per Spencer, J.; but in this case the court refused to receive the document, which was a will, as it had not been 30 years since the testator's death, though more than 30 since the execution of the will. But see, to the effect that the attesting witness, if alive, must be produced, even though document is more than 30 years old, Tolman v. Emerson, 4 Pick. (Mass.) 160.

[89] Gardner v. Granniss, 57 Ga. 539, 554.

is, therefore, in such case, no occasion for requiring any proof. The production of the document is sufficient.[90]

Writings Collaterally in Issue.

There is another principle recognized in the cases tending to a relaxation of the strict rule requiring proof by subscribing witness. This is that where the contract is brought in issue only collaterally, and not between parties claiming any rights under it, its execution may be proved by testimony of the maker, without resorting first to the subscribing witness.[91] This is analogous to the principle under which the contents of a document, when the question arises incidentally, are permitted to be proved by oral testimony without producing the original.[92]

Waiver by Adverse Party.

A party may waive his right to have a document proved in the ordinary way, but, in order to be taken advantage of, it must be a formal waiver or admission for the particular purpose.[93] So, also, if the instrument is in the possession of the adverse party, who refuses to produce it on notice, he cannot hold the other party to proof of its execution by subscribing witnesses.[94] This is analogous to the principle al-

[90] Jackson v. Kingsley, 17 Johns. (N. Y.) 158; McGregor v. Wait, 10 Gray (Mass.) 72, 75, 69 Am. Dec. 305; Pearce v. Hooper, 3 Taunt. 60; McBrayer v. Walker, 122 Ga. 245, 50 S. E. 95.

[91] Skinner v. Brigham, 126 Mass. 132; Curtis v. Belknap, 21 Vt. 433; Demonbreun v. Walker, 4 Baxt. (Tenn.) 199.

[92] Ante, p. 428.

[93] Steph. Dig. Ev. art. 66; Forsythe v. Hardin, 62 Ill. 206; Whyman v. Garth, 8 Exch. 803, 807; Fox v. Reil, 3 Johns. (N. Y.) 477; Richmond & D. R. Co. v. Jones, 92 Ala. 218, 226, 9 South. 276. But see Blake v. Sawin, 10 Allen (Mass.) 340, 343, where the admission was held to excuse proof of execution, though not made for that purpose. See, to the effect that an admission in conversation previous to trial of the execution of a promissory note is admissible without proof of inability to call subscribing witnesses, Hall v. Phelps, 2 Johns. (N. Y.) 451. This case was distinguished in Fox v. Reil, supra, on the ground that a promissory note did not require a subscribing witness, and therefore in reference to it the rule could be safely relaxed.

[94] Cooke v. Tanswell, 8 Taunt. 450, 453.

ready referred to, that when the door is opened to secondary evidence there are no degrees of such evidence.[95]

PROOF OF HANDWRITING.

287. The genuineness of handwriting may be proved in the ordinary way by direct or circumstantial evidence. It may also be proved by opinion evidence, provided the witness called to give his opinion

(a) Has seen the person whose handwriting is in question write at least once, or

(b) Has received written communications purporting to be in the handwriting of such person, and has acted upon them, or

(c) Is an expert on the subject of handwriting, and gives his opinion from a comparison of the document in question with an admittedly genuine specimen.

288. It may also be proved by the evidence which the jury may get directly from comparison of the disputed specimen with an admittedly genuine specimen which has been introduced in evidence.

In connection with the proof of the execution of documents we have seen that it becomes necessary to prove the handwriting of the maker, or of the attesting witnesses, or both. In the proof of matter of this character there are certain rules which have grown up. These rules have been referred to, and some of the authorities cited, in an earlier part of this work.[96] They are, however, more closely connected with the subject of documents, and have their proper place in the treatment of that subject. It may be said, in the first place, that proof of handwriting may be waived by the admission of the opposing party of its authenticity. This is not, strictly speaking, a form of proof of handwriting, but is one method of making a document admissible where otherwise proof would be required.[97] Proof of handwriting may consist of the tes-

[95] Ante, p. 433 [96] Ante, p. 249.

[97] In Nichols v. Allen, 112 Mass. 23, there was no evidence offered to prove the making of a note, except answers of the defendant to questions put to him. As the original note was not submitted to him, his answers can hardly be regarded as relating to proof of a signature. They were rather of the nature of circumstantial evidence, to

timony of the writer himself or any one who saw the writing made; may consist of ordinary circumstantial evidence, showing the probability of the writing having been made by the person purporting to have made it, or of opinion evidence in respect to the writing, and of a comparison with admittedly genuine specimens. With regard to the testimony of the writer himself, or of one who saw the writing made, or the ordinary circumstantial evidence which may bear on the question, nothing need be said, as it in no respects differs in its nature and manner of introduction from the evidence of other facts. When we come, however, to opinion evidence, we have several rules which are useful to bear in mind. These relate to the qualification of the person who may give an opinion as to the handwriting in question.

SAME—BY ONE WHO HAS SEEN THE PERSON WRITE.

289. One who has seen the person write at another time is qualified to express an opinion as to the authenticity of the writing in question.

It has from very early times been settled that no great degree of familiarity with the handwriting is required to render a witness competent to give an opinion. If he has seen the person write a single time, it has generally been held sufficient.[98] The law is not technical when it comes to proof of handwriting, and allows any reasonably reliable testimony. In fact, the genuineness of a document is so largely determined by its connection with the circumstances and persons involved in the case that it may be determined to a practical certainty without resort to

be considered in connection with his manner and the circumstances attending his examination. The answer which the court said was "evidence to go to the jury" was: "I signed a note, but whether it was payable to L. A. Wilder or order I am unable to say. Neither can I say it was one, a copy whereof is annexed to the plaintiff's declaration. [I am unable to say.] It was something of that purport."

[98] A good case upon the subject of proof of handwriting will be found in Keith v. Lothrop, 10 Cush. (Mass.) 453. See, also, Com. v. Nefus, 135 Mass. 533; Hopkins v. Megquire, 35 Me. 78; Edelen v. Gough, 8 Gill (Md.) 87, 90; State v. Gay, 94 N. C. 814; Sidney's Trial, 9 How. St. Tr. 818, 854.

any formal proof. The requirements, therefore, as to evidence expressly directed to the handwriting itself, are not strict. One who has seen a person write a single time is really not qualified to express an opinion of value as evidence in respect to the genuineness of a disputed specimen of the same handwriting. Yet as we have seen, his testimony is generally allowed. In cases of real contest as to genuineness it is likely that such testimony has very little weight with the jury. Where it is useful is in supplying just enough evidence of genuineness in cases where the handwriting must be proved, but is not actively contested, to give the necessary basis for the jury's finding. It is in accordance with this principle that the courts have held that an ability to read and write is not absolutely necessary to make a person competent as a witness to handwriting.[99] Yet a certain degree of intelligence must be shown to make the testimony of any weight.[100] If the witness states he has seen the person write, but is unable to say that from such observation he knows the handwriting sufficiently to recognize it, he is not competent to testify.[101] With respect to the time when the witness has seen the person write, it is not necessary that it shall have been before the time of the handwriting in dispute. A person's handwriting is treated as a uniform thing, and observation at one time sufficiently qualifies a witness to recognize a specimen made at another, whether before or after.[102] Such observation, however, must have been prior to the existence of the controversy.[103] In the case of a signature made by a witness who cannot write, and who therefore merely affixes his mark in the shape of a cross to his name, written by some other person, it would seem that there was little value in testimony based on familiarity

[99] Foye v. Patch, 132 Mass. 105.

[100] People v. Corey, 148 N. Y. 476, 483, 42 N. E. 1066.

[101] Nelms v. State, 91 Ala. 97, 9 South. 193. And see Burnham v. Ayer, 36 N. H. 182. Compare Pepper v. Barnett, 22 Grat. (Va.) 405, where the witness was permitted to give his opinion, though stating "that he was not familiar with the handwriting of the said Ann R. Barnett, never having seen her write but once, and then only to make her signature; that he would not be able, from his knowledge of her handwriting, to distinguish it from that of others."

[102] Keith v. Lothrop, 10 Cush. (Mass.) 453.

[103] Territory v. O'Hare, 1 N. D. 30, 44 N. W. 1003.

with previous signatures of the same kind. Yet it is held that such testimony is admissible.[104]

SAME—BY ONE FAMILIAR WITH THE WRITING.

290. One who has received communications from a person whose handwriting is in question, in the ordinary course of business, and has acted on the same, is competent to express an opinion.

The familiarity which a witness has acquired with the handwriting of another through business dealings with him, which have involved the frequent examination of, reading of, and reliance upon his writing, is held sufficient to qualify the witness to testify concerning it.[105] This is in line with the principle upon which the courts so often act when they adopt the business man's standard in dealing with the proof of facts which come before them. One who has had correspondence with another upon which he has relied in business matters,[106] one who has dealt with the notes or checks of another, relying upon the signatures thereon, one who has dealt in any regular business manner with the writing or signature of another, is

[104] Strong's Ex'rs v. Brewer, 17 Ala. 706, 710.

[105] See the authorities cited in note 70, ante, p. 250, and also Hammond v. Varian, 54 N. Y. 398; Rogers v. Ritter, 12 Wall. (U. S.) 317, 20 L. Ed. 417; Clark v. Freeman, 25 Pa. 133; Tuttle v. Rainey, 98 N. C. 513, 4 S. E. 475; Empire Manuf'g Co. v. Stuart, 46 Mich. 482, 484, note, 9 N. W. 527; Board of Trustees of Tp. 13 v. Misenheimer, 78 Ill. 22. In Sidney's Trial, 9 How. St. Tr. 817, at page 854, we find the court admitting testimony from a witness who had received notes with the indorsement of the person whose handwriting was in dispute, and had paid them. The following may be quoted: "L. C. J.: What say you, Mr. Cooke? Cooke: My lord, I did never see Colonel Sidney write, but I have seen several notes that have come to me with indorsement of his name, and we have paid them, and it is like to this. L. C. J.: And you were never called to account for mispayment? Cooke: No, my lord." See, also, Tharpe v. Gisburne, 2 Car. & P. 21. In Cody v. Conly, 27 Grat. (Va.) 313, a witness was held competent who, 13 years previous, had received several orders for the payment of money purporting to be signed by C., who was at the time digging a well for him, and had paid the orders.

[106] Huber Mfg. Co. v. Claudel, 71 Kan. 441, 80 Pac. 960.

certainly competent to testify concerning the handwriting of such other person. As a business man, he would have no hesitation in relying upon his own familiarity with the handwriting, and the courts have in this, as in many other instances, accepted the business man's standard. If the witness has merely seen letters or other writings meant for third persons, and has not himself conducted the correspondence, or acted upon it in a business way, he will not be competent.[107] It is largely the element of reliance in business matters upon the genuineness of the writing that is the ground of competency. Where examination of genuine specimens, either written in the presence of the witness or admitted to be genuine at the time of his observation, is made for the purpose of the witness afterwards testifying, it does not sufficiently qualify him. Even if he be an expert, he cannot thus familiarize himself, so as to become a competent witness.[108] Of course, if the genuine specimens which he has examined be produced in court, and the witness be asked to testify from a comparison of them with the specimen in dispute, he may, if otherwise qualified as an expert, give his opinion as such.

SAME—BY THE OPINIONS OF EXPERTS.

291. Testimony of persons especially qualified by education and training to judge of handwriting, based on a comparison of the disputed writing with admittedly genuine specimens, is admissible as expert opinion.

The testimony of experts in respect to handwriting has been taken up under the subject of "Opinion Evidence," and it will be sufficient here to refer to its discussion there. The cases will be found there cited.[109]

[107] For an early case, see Ferrers v. Shirley, Fitzg. 195; Nunes v. Perry, 113 Mass. 274, 277; Philadelphia & W. C. R. Co. v. Hickman, 28 Pa. 318, 328.

[108] The Fitzwalter Peerage, 10 Clark & F. 193; Hynes v. McDermott, 82 N. Y. 41, 37 Am. Rep. 538; Reese v. Reese, 90 Pa. 89, 35 Am. Rep. 634. See, also, note 250, ante, p. 71.

[109] Ante, pp. 249–252, and notes 68–77. Expert testimony, based on comparison made by the witness in court before the jury, is now admitted in many states. In addition to the cases cited in the notes re-

SAME—BY COMPARISON OF HANDS BY JURY.

292. The jury may base their conclusions as to the genuineness of handwriting upon comparison of the disputed writing with genuine specimens already in evidence, and in some jurisdictions genuine specimens are received solely for the purpose of such comparison.

What is known as juxtaposition of hands was not allowed by the earlier common law,[110] although there was a rule that, if a document admitted to be genuine was already in the case, the jury would be permitted to compare it with the writing in question.[111] There are, of course, objections to this form of proof in the danger of choosing unfair specimens, and in the multiplication of the issues; but in spite of this it has come to be established law in some jurisdictions that it will be allowed,[112] though in some jurisdictions the authorities do not

ferred to above, see Koons v. State, 36 Ohio St. 195; Yates v. Yates, 76 N. C. 142, 149; State v. Tompkins, 71 Mo. 613. But the common-law doctrine still prevails in some. Kernin v. Hill, 37 Ill. 209; Jones v. State, 60 Ind. 241; Davis v. Fredericks, 3 Mont. 262. In New York the testimony of experts based on comparison is allowed, but only in case the genuine specimens have been introduced in evidence for some other purpose. Hynes v. McDermott, 82 N. Y. 41, 49, 37 Am. Rep. 538.

[110] See opinion of Lord Eldon in Eagleton v. Kingston, 8 Ves. 438, 473.

[111] Doe v. Newton, 5 Adol. & E. 514. In Griffith v. Williams, 1 Cromp. & J. 47, it is said per curiam: "Where two documents are in evidence, it is competent for the court or the jury to compare them. The rule as to the comparison of handwriting applies to witnesses, who can only compare a writing as to which they are examined with the character of the handwriting impressed upon their own minds; but that rule does not apply to the court or jury, who may compare the two documents when they are properly in evidence."

[112] Lyon v. Lyman, 9 Conn. 55, 62; Haycock v. Greup, 57 Pa. 438. But the specimen introduced as a standard of comparison must be sufficiently authenticated as a genuine specimen. For example, it has been held not sufficient that it has been received in reply to a letter written to the party whose handwriting is in question, and purports to be written by such party. McKeone v. Barnes, 108 Mass. 344. The indorsement upon a check drawn by the witness to the order of the person whose handwriting was in question and returned from the bank has been held insufficient for purposes of comparison.

go so far.[113] Specimens used for comparison before the jury must be fair specimens, not manufactured for the purpose of comparison, but taken from among writings which have been made for other purposes.[114]

Indirectly, the comparison of hands before the jury might have come about, even though directly prohibited. For instance, if a witness was testifying upon the ground that he had seen the party write, he might have been allowed to produce the specimen of the writing which he had seen, and upon which he based his opinion, in order that the jury might judge of the value of his opinion. Or, again, a specimen of the person's handwriting might have been offered a witness to refresh his recollection, and then, on the ground that the jury has the right to inspect papers used for this purpose, it might have been put before them. In this way a part, at least, of what is accomplished when an expert is examined would be covered, namely, the getting of an actual comparison between a disputed and genuine specimen. On the other hand, the jury would not have the benefit of the explanation of the

Mississippi Lumber & Coal Co. v. Kelly (S. D.) 104 N. W. 265. On the same line, see Van Sickle v. People, 29 Mich. 61, 64. In England the common-law rule has been changed by statute so far as civil cases are concerned. 17 & 18 Vict. c. 125, § 27.

[113] Randolph v. Loughlin, 48 N. Y. 456; Tome v. Railroad Co., 39 Md. 36, 17 Am. Rep. 540; Hazleton v. Union Bank, 32 Wis. 34. 47; Bevan v. Atlanta Nat. Bank, 142 Ill. 302. 308. 31 N. E. 679; Weldman v. Symes, 116 Mich. 619, 74 N. W. 1008. But see Miles v. Loomis, 75 N. Y. 288, 31 Am. Rep. 470, where it was held that if the writings were in evidence, though introduced for other purposes, comparison could be made by experts and by the jury or referee. And by statute in New York comparison of "a disputed writing with any writing proved to the satisfaction of the court to be genuine" has been provided for. Laws N. Y. 1880, c. 36.

[114] King v. Donahue, 110 Mass. 155, 14 Am. Rep. 589. But see Singer Manuf'g Co. v. McFarland, 53 Iowa, 540, 5 N. W. 739, where, under statutory provision permitting comparison, a signature made during the pendency of the action to one of the pleadings was admitted; the court saying: "It would doubtless have been in better taste for the defendant to have introduced his writings made at a time and upon an occasion when the motive to disguise was not apparent. This was matter for the consideration of the jury, but we can find no warrant for excluding the evidence." To same effect, Mississippi Lumber & Coal Co. v. Kelly (S. D.) 104 N. W. 265.

similarities and differences which appear to the practiced eye to aid them in forming an opinion. It seems, therefore, that if any actual comparison is to be allowed, it is rendered more valuable by its being accompanied by expert testimony.

Proof of Relationship by Resemblance.

In connection with the subject of proof of handwriting by comparison of hands, reference may be made to the proof of relationship by resemblance. In cases of bastardy, and often also in cases where heirship is involved, it becomes necessary to connect a child with its father. In these cases attempts have been made, in the absence of better proof, to show resemblance or lack of it between the child and the alleged father. Two classes of testimony have been offered,—the one, testimony of persons who have seen the child and its alleged father, and who, from such observation, have an opinion as to the resemblance between them; the other, the placing of the child and the alleged father before the jury, and allowing them to draw their own inferences as to resemblance. The courts have not favored the former method,[115] but have quite generally allowed the latter.[116]

EVIDENCE AFFECTING THE CONTENTS OF DOCUMENTS.

293. There is a general rule, sometimes spoken of as the "oral evidence rule," which declares evidence, the effect of which is to vary the terms of a written instrument, or to change, cut down, or alter the effect thereof, to be inadmissible.

The rule above stated finds its proper application in cases where the written instrument is in the nature of a contract, deed, or other paper, expressive of acts or conclusions done or arrived at between two or more parties.

There is a group of cases in connection with which the rule

[115] Young v. Makepeace, 103 Mass. 50, 54; Keniston v. Rowe, 16 Me. 38; Jones v. Jones, 45 Md. 144, 151. But see contra, State v. Bowles, 52 N. C. 579.

[116] Scott v. Donovan, 153 Mass, 378, 26 N. E. 871; Finnegan v. Dugan, 14 Allen (Mass.) 197; Gilmanton v. Ham, 38 N. H. 108, 112; Warlick v. White, 76 N. C. 175; State v. Woodruff, 67 N. C. 89.

is sometimes cited, which do not in fact present instances of its application. These are cases where the writing itself is the essential thing to be dealt with, and not, as in the case of a contract, the mere evidence of an understanding. Such cases are found where judicial records and proceedings, or official records and documents, are brought into question. Such writings are sometimes found to be defective, by reason of omission of certain parts, or of certain formalities of execution. In such case parol evidence is not admissible to make valid what in itself is invalid and ineffective. Parol evidence is not excluded by reason of the rule against the varying of the terms of a written instrument, but for the simple reason that the writing itself is the thing to be dealt with, and it must be dealt with in the form in which it is found, and be held valid or invalid accordingly. It cannot be changed into something different from what it is by the oral testimony of witnesses. A void judgment cannot in this way be made valid.[117] Nor can an ineffective assessment for taxes be made valid by oral evidence.[118]

[117] Pfeiffer v. McCullough, 115 Ill. App. 251.

[118] Paine v. Trust Co., 136 Fed. 527, 69 C. C. A. 303. See, also, Brooks v. School Dist., 73 N. H. 263, 61 Atl. 127; Godfrey v. Phillips, 209 Ill. 584, 71 N. E. 19; Chippewa Bridge Co. v. City of Durand, 122 Wis. 85, 99 N. W. 603, 106 Am. St. Rep. 931; Town of Wilson v. Markley, 133 N. C. 616, 45 S. E. 1023; Oster v. Broe, 161 Ind. 113, 64 N. E. 918; Speirs Fish Co. v. Robbins, 182 Mass. 128, 65 N. E. 25.

These cases must not be confused with the cases where the writing is merely evidence of some act, and where the act and not the writing is in question. In such cases parol evidence is generally received. Parol evidence has been held admissible to show when a document was filed in the clerk's office, although contradicting the clerk's file mark. It is, however, held in some jurisdictions that the record of the filing is conclusive. Sweet v. Gibson, 123 Mich. 699, 83 N. W. 407.

The action of an official board or department may be shown by parol evidence, although minutes of the meeting have been kept. State v. Aldridge, 66 Ohio St. 598, 64 N. E. 562; State v. Alexander, 107 Iowa, 177, 77 N. W. 841.

But in some jurisdictions it is held that official journals or records of proceedings at meetings of this character have a formal and conclusive character, and where this is the law parol evidence to contradict them is excluded. City of Dallas v. Beeman, 18 Tex. Civ. App.

The rule in its application within its own proper field of writings is founded on the idea that where there is a writing declaring or defining rights and liabilities, there the writing will be conclusive, and that it cannot be shown that the arrangement or agreement which the writing expresses is different from the expression of it contained in the document. There is a distinction between proving the existence of a contract in writing and proving matter which tends to modify the terms of a contract already in evidence. The document itself, once properly authenticated, tells its own story; but, if the document is not produced, its existence and terms must be proved by other evidence, and conflicting evidence may be introduced as to such matters, from which the jury must infer what the terms of the contract in fact were. Thus, if it is necessary to prove the terms of a written instrument by secondary evidence of an oral nature, there is little opportunity to apply the rule as to varying the terms of a written instrument by parol testimony; but if the existence and terms of the contract be proved by the original paper, or by accurate written copies, the rule finds a ready application, and any parol testimony tending to modify it is excluded.

The question whether this rule is, strictly speaking, a rule of evidence, or a rule of substantive law, has been raised in connection with the cases which have discussed the effect of oral evidence introduced without objection. The prevailing opinion seems to be that the evidence, if once admitted, may be used for all purposes.[119]

335, 45 S. W. 626; Mullins v. Shaw, 77 Miss. 900, 27 South. 602; Cowley v. School Dist., 130 Mich. 634, 90 N. W. 680.

[119] Union Bank of Brooklyn v. Case (Sup.) 84 N. Y. Supp. 550; Frauenthal v. Bridgeman, 50 Ark. 348, 7 S. W. 388. In a note upon this question in 17 Harvard Law Rev. 271, the view is taken that parol evidence which varies the terms of a written contract "is rejected because it is irrelevant"; that is, because there is a rule of substantive law which holds parties to contracts in the form in which they have been written down, in spite of any verbal understandings inconsistent therewith. If this view be correct, then the jury should be instructed to disregard parol evidence of this character which has crept into the record without objection.

SAME—REASON FOR RULE.

294. The rule is based upon an assumed intention on the part of the contracting parties, evidenced by the existence of the written contract, to place themselves above the uncertainties of oral testimony, and on a disinclination of the courts to defeat this object.

When persons express their agreements in writing, it is for the express purpose of getting rid of any indefiniteness, and to put their ideas in such shape that there can be no misunderstanding, which so often occurs where reliance is placed upon oral statements. Written contracts presume deliberation upon the part of the contracting parties, and it is natural that they should be treated with careful consideration by the courts, and with a disinclination to disturb the condition of matters as embodied in them by the act of the parties.[120] The general rule, therefore, precludes the introduction of testimony to show that the parties meant other than they have said in the writing itself.[121] But it sometimes happens that writings are procured to be executed by fraud, or do not contain all the agreements between the parties, having been used only to cover certain matters, while others are left to oral understanding; or there may be other circumstances which make it unjust to confine the parties strictly to writings made between them. In such cases the courts have admitted oral testimony, not for the purpose of varying the terms of the written instrument itself, but for the purpose of proving facts which affect the standing of the parties with respect to the writings. These cases are usually treated as exceptions to the

[120] Platt's Adm'r v. U. S., 22 Wall. (U. S.) 496, 506, 22 L. Ed. 858; Rickerson v. Insurance Co., 149 N. Y. 307, 314, 43 N. E. 856; Baltimore Permanent Building & Land Soc. v. Smith, 54 Md. 187, 200, 39 Am. Rep. 374; Conant v. National State Bank, 121 Ind. 323, 22 N. E. 250.

[121] An interesting application of the rule is found in the case of Delaware Indians v. Cherokee Nation, 193 U. S. 127, 24 Sup. Ct. 342, 48 L. Ed. 646, where it was held that the agreement of April 8, 1867, entered into between the Delaware and Cherokee Nations, was not open to explanation by parol evidence of the understanding of the parties.

general rule, though not strictly such. A few of them may be noticed.

SAME—VALIDITY OF INSTRUMENT QUESTIONED.

295. When a written instrument is alleged to be invalid for fraud in its procurement, or any other reason, oral testimony is admissible to show the circumstances of the execution.

A document, the execution of which has been procured by fraud or intimidation, may always be attacked. So, also, the fact that it was not duly executed, or that it is wrongly dated, or was executed by mistake, may be shown. Anything affecting the validity of the instrument, whether it relates to the instrument itself or to the parties purporting to have executed it, may be proved by parol.[122] This is not varying the terms of the document so much as it is throwing light upon its char-

[122] 1 Greenl. Ev. § 284. In Pym v. Campbell, 6 El. & Bl. 370, A. sued X. upon a contract for the sale of certain goods. X. offered evidence to show that the contract, though absolute on its face, was not to be binding until approved by B. This evidence was held admissible as attacking the validity of the contract, and not varying its terms. Kansas City, M. & B. R. Co. v. Chiles, 86 Miss. 361, 38 South. 498; Commissioners of Allegheny County v. Warfield, 100 Md. 516, 60 Atl. 599, 108 Am. St. Rep. 446. In the latter case it was sought to compel the Governor to forward to the clerk of the court a statute alleged to have been passed and approved. Oral testimony was offered of the Governor to the effect that he signed the bill by mistake, not knowing what paper it was, and that he immediately erased his name. The testimony was objected to on the ground that parol evidence could not be received to vary the writing. The testimony was held to be admissible, as going directly to the validity of the instrument. See, also, Mendenhall v. Ulrich, 94 Minn. 100, 101 N. W. 1057; Shields v. Exploration Co., 137 Fed. 539, 70 C. C. A. 123.

Failure of consideration may always be shown, since it touches the validity of the instrument. Gaar, Scott & Co. v. Hill, 113 Mo. App. 10, 87 S. W. 609; Wood v. Bangs, 2 Pennewill (Del.) 48 Atl. 189; Eckler v. Alden, 125 Mich. 215, 84 N. W. 141; Aldrich v. Whitaker, 70 N. H. 627, 47 Atl. 591. Fraud may always be shown. Machin v. Trust Co., 210 Pa. 253, 59 Atl. 1073; Metzger v. Roberts, 26 Ohio Cir. Ct. R. 675; Mason v. Cable Co., 71 S. C. 150, 50 S. E. 781; Corbett v. Joannes, 125 Wis. 370, 104 N. W. 69; J. G. Shaw Blank Book Co. v. Maybell, 86 Minn. 241, 90 N. W. 392.

acter. It is showing that legally there is no such instrument in existence as there purports to be. It is, therefore, no exception to the parol evidence rule, though loosely spoken of as such.[123]

SAME—COLLATERAL ORAL AGREEMENTS.

296. Where the writing covers only part of the transactions between the parties, and there are oral agreements relating to the same subject, such agreements may be shown.

If it appears that the parties did not intend the writing to embody all the transactions between them, the rule is that such transactions as do not purport to be covered by the document, but which supplement or complete it, may be proved.[124] Here, again, there is no varying of the terms of a written instrument. It is only because it has been sought to stretch the rule to cover cases that it never was intended to cover that we have this apparent exception to it. Any oral agreement relating to the document itself, and made subsequent to it, may be shown. Such an agreement, as only modifying, rescinding, or in some other way affecting the written agreement, is thus admissible.[125] There are some peculiarities in the application of this principle. They arise out of other rules of law not connected with evidence, which prevent the introduction of that which, so far as the rules of evidence go,

[123] Southern Street-Railway Advertising Co. v. Manufacturing Co., 91 Md. 61, 46 Atl. 513.

[124] Davies v. Bierce, 114 La. 663, 38 South. 488; Niles v. Sire, 46 Misc. Rep. 321, 94 N. Y. Supp. 586; Knelpper v. Richards, 26 Ohio Cir. Ct. R. 245; Bell v. Wiltson, 5 Neb. (Unof.) 486, 98 N. W. 1049; Gould v. Metal Co., 207 Ill. 172, 69 N. E. 896; State v. Cunningham, 154 Mo. 161, 55 S. W. 282. It is sometimes difficult to tell just when a written instrument is complete. Much depends upon the surrounding circumstances, and it has been held that the incompleteness need not appear on its face. Chapin v. Dobson, 78 N. Y. 74, 34 Am. Rep. 512. See, also, note on case of Violette v. Rice, 173 Mass. 82, 53 N. E. 144, in 13 Harvard Law Rev. p. 139.

[125] Coe v. Hobby, 72 N. Y. 141, 147, 28 Am. Rep. 120; Kennebec Co. v. Banking Co., 6 Gray (Mass.) 204; Quigley v. De Haas, 98 Pa. 292; Brown v. Everhard, 52 Wis. 205, 8 N. W. 725; Goss v. Lord Nugent, 5 Barn. & Adol. 65; Vezey v. Rashleigh, 73 Law J. Ch. 422.

would be admissible. Thus it is held, though the authorities are conflicting, that where a contract is such as the statute of frauds requires to be in writing, no collateral oral agreement will be allowed to be shown.[126] It is also held that the collateral oral agreement must have an independent consideration in order to be admissible.[127] As a principle of the law of contracts, it would seem that no collateral agreement would be of any effect in modifying the original unless there was a consideration to support it, and these decisions are therefore strictly logical.

SAME—WRITING A MERE MEMORANDUM.

297. A writing which is merely a memorandum referring to an oral agreement between the parties does not preclude the parties from showing the full contract as orally agreed upon.

If the document is merely a memorandum, and it does not appear that it was intended to contain all the terms of the agreement between the parties, parol evidence as to the agreement is admissible. The fact that a writing exists does not shut out oral testimony unless it appears that the writing was intended to embody the terms of the agreement and speak for the parties.[128]

[126] Hill v. Blake, 97 N. Y. 216, holds evidence of such subsequent oral contract inadmissible. In Packer v. Steward, 34 Vt. 127, where an oral contract was taken out of the statute by part performance, evidence of a parol collateral understanding was admitted. And see Kribs v. Jones, 44 Md. 396.

[127] Coe v. Hobby, 72 N. Y. 141, 148, 28 Am. Rep. 120; Malone v. Dougherty, 79 Pa. 46, 52. But see Brown v. Everhard, 52 Wis. 205, 8 N. W. 725.

[128] Allen v. Pink, 4 Mees. & W. 140; Thomas v. Nelson, 69 N. Y. 118.

SAME—ORAL EVIDENCE OF CUSTOM.

298. Where there is a custom to which the contract is subject, it may be proved by parol.

It sometimes happens that the custom of a particular trade is such that contracts are made with reference to it, and, though not expressed therein, it is understood to be always observed, and binding upon the parties. If, in such case, it becomes material to show the existence of the custom as a part of the contract, it may be done by parol evidence.[129] So, also, the language used may contain terms which, by custom in the locality where the instrument is executed, have a certain meaning. Such meaning may be proved by parol evidence.[130]

But, where the language of the contract is plain, it has been generally held that evidence of a custom or usage contradicting such language is inadmissible.[131]

SAME—WRITING BROUGHT IN ISSUE COLLATERALLY.

299. Oral evidence is admissible to show negotiations, promises, agreements, and other transactions, although embodied in written contracts, provided the contract itself is not the basis of the action.

The relations between two persons who have contracted in writing may be brought in issue collaterally in a suit between others. In such case the parol evidence rule does not apply. The facts may be proved as they exist, regardless of the oral evidence varying the terms of any writing between the par-

[129] Page v. Cole, 120 Mass. 37; Newhall v. Appleton, 114 N. Y. 140, 21 N. E. 105, 3 L. R. A. 859.

[130] Myers v. Sarl, 3 El. & El. 306; Rochester German Ins. Co. v. Peaslee Gaulbert Co., 27 Ky. Law Rep. 1155, 87 S. W. 1115, 1 L. R. A. (N. S.) 364.

[131] Burton v. Oil Co., 204 Pa. 349, 54 Atl. 266; Chilberg v. Lyng, 128 Fed. 899, 63 C. C. A. 451; Withers v. Moore (Cal.) 71 Pac. 697; Deacon v. Mattison, 11 N. D. 190, 91 N. W. 35; Menage v. Rosenthal, 175 Mass. 358, 56 N. E. 579; Shores Lumber Co. v. Stitt, 102 Wis. 450, 78 N. W. 562.

ties.[182] The rule is one enforced for the benefit of parties who have agreed upon written expression of their relations, and the reason for its application ceases when the rights of others are involved who have neither made the writing nor claim anything under it.

SAME—EVIDENCE AS TO ALTERATIONS.

300. Evidence may be offered with respect to alterations appearing on the face of written instruments in explanation of such apparent alterations. Such evidence does not vary the terms of the instrument, but merely shows what it is.

Where, on the face of a writing, there appear alterations by erasure or interlineation, evidence is admissible to show the time at which, and circumstances under which, such alterations were made. This is for the purpose of showing the terms of the writing, and how it is to be considered legally.[183] There is a great deal said in the cases with respect to alterations in documents, and the various so-called presumptions in respect to them. A distinction is made between different sorts of documents. It is often said that in deeds, if alterations appear,

[182] 1 Greenl. Ev. § 279; McMaster v. President, etc., of Insurance Co. of North America, 55 N. Y. 222, 14 Am. Rep. 239; Burnham v. Dorr, 72 Me. 198; Burns v. Thompson, 91 Ind. 146. But see Taft v. Little, 178 N. Y. 127, 70 N. E. 211, commenting on this case. A note in 17 Harvard Law Rev. 560, proposes a modification of the rule as stated in the text, expressed as follows: "Where the facts desired to be proved can easily be established without the document, its production may be dispensed with. Where, on the other hand, proof without the document would be difficult and unsatisfactory, the court will require it in evidence."

[183] Gilmor's Estate, 154 Pa. 523, 529, 26 Atl. 614, 35 Am. St. Rep. 855. Where an alteration of an instrument in a material part is shown to have been made, it was the old common-law doctrine that the instrument was void, even though it were shown that the alteration was accidental. Davidson v. Cooper, 11 Mees. & W. 778. This doctrine is criticised by Taylor (2 Tayl. Ev. § 1829), and it is not the American rule. U. S. v. Spalding, 2 Mason (U. S.) 482, Fed. Cas. No. 16,365. Where the alteration is in an immaterial part of the instrument, it does not affect its validity. Aldous v. Cornwell, L. R. 3 Q. B. 573. But see Jones v. Crowley, 57 N. J. Law, 222, 30 Atl. 871.

it will be presumed that the alterations were made before the execution of the deed,[184] while in wills it will be presumed that the alterations were made afterwards.[185] This is one of the cases of spurious presumptions already referred to.[186] If the matter be considered on principle, and in the light of the real nature of the bulk of the decisions, it will be found that there is no presumption with respect to the matter at all in the sense that there is any effect on the proof.[187] If the party producing the instrument bases his case on the fact that the alterations were made before execution, he must introduce evidence to that effect. If, on the contrary, he relies on the document in its original form, he must show that the alterations were made after the execution.[188] If there is no evidence at all in respect to the alteration, the document is not proved, either in its original or altered shape, and therefore the party relying on it must lose his case.[189] It is seldom,

[184] In Doe v. Catomore, 16 Q. B. 745, Lord Campbell, C. J., says: "In Co. Litt. 225b, it is said that 'of ancient time, if the deed appeared to be rased or interlined in places material, the judges adjudged upon their view the deed to be void. But of latter time the judges have left that to the jurors to try whether the rasing or interlining were before the delivery.' In a note (1) [136] upon this passage in Hargrave and Butler's Edition of Coke upon Littleton, it is laid down: 'Tis to be presumed that an interlining, if the contrary is not proved, was made at the time of making the deed.' This doctrine seems to us to rest upon principle. A deed cannot be altered, after it is executed, without fraud or wrong, and the presumption is against fraud or wrong. A testator may alter his will without fraud or wrong after it has been executed, and there is no ground for any presumption that the alteration was before the will was executed."

[185] Steph. Dig. Ev. art. 89; Cooper v. Bockett, 4 Notes Cas. 685.

[186] Ante, p. 99.

[187] Ely v. Ely, 6 Gray (Mass.) 439; Lilly v. Person, 168 Pa. 219, 232, 32 Atl. 23; Eberenkrook v. Webber, 100 Mich. 314, 58 N. W. 665, and 60 N. W. 761; Milliken v. Marlin, 66 Ill. 13, 20; Hagan v. Insurance Co., 81 Iowa, 321, 330, 46 N. W. 1114, 25 Am. St. Rep. 493. Compare with this case, Shroeder v. Webster, 88 Iowa, 627, 55 N. W. 569; Johnson v. Duke of Marlborough, 2 Starkie, 313.

[188] See opinion of Vice Chancellor Sir W. Page Wood in Williams v. Ashton, 1 Johns. & H. 115, 118.

[189] In New Hampshire, after full consideration, the courts have laid down the rule that if there is an "entire absence of evidence and of circumstances, both in the instrument and in the evidence aliunde, from which an inference can be legitimately drawn as to the time

however, that there is not some evidence in the document itself; evidence from the manner in which the alteration is made, and which may be sufficient to satisfactorily explain it. Such evidence, known as intrinsic or internal evidence, may be sufficient to justify a finding as to whether the alterations were made before or after execution.[140]

when it was actually made, then the presumption arises that the alteration was made after the execution of the instrument." Opinion of Sargent, J., in Cole v. Hills, 44 N. H. 227, 235. And to the same effect is Hills v. Barnes, 11 N. H. 395. But does this mean any more than that the party relying on the instrument must prove it? If there is an absence of all evidence (and by this the court means absence of any indications in the paper itself from which an inference can be drawn), the person relying on the instrument has not proved it, and as a matter of course the case must go against him without calling in the aid of any presumption. See Hayden v. Goodnow, 39 Conn. 164, where it is held that "the burden of proof of accounting for an erasure or alteration is not necessarily on the party producing the instrument. * * * Each case must depend on its own circumstances, and the triors must be satisfied that the erasure or alteration was fairly made, so as not to affect the validity of the instrument." The court here perhaps lost sight of the fact that the burden of proof may be temporarily satisfied, and the burden of proceeding consequently shifted, by the intrinsic evidence appearing on the face of the instrument itself.

[140] "Here, from all the circumstances, it was at least for the surrogate to determine whether this interlineation was made before or after execution, and in making that determination he was bound to consider the handwriting, the color of the ink, the manner of the interlineation, the fact that it was noted at the bottom of the instrument, and that it was made to correspond with the other duplicate. Where an interlineation or erasure in a will is fair upon its face, and it is entirely unexplained, there being no circumstance whatever to cast suspicion upon it, it would not be proper for any court to hold that the alteration was made after execution; but, if there are any suspicious or doubtful circumstances growing out of the mode of the alteration, the ink in which it was made, the fact that it was in favor of the party holding the instrument, and that it is not noted at the bottom, then these and all the other circumstances must be submitted as questions of fact to be determined by the court in deciding whether the alterations were made before execution or not." From opinion of Earl, J., in Crossman v. Crossman, 95 N. Y. 145, 153. See, also, Ely v. Ely, 6 Gray (Mass.) 439; Cole v. Hills, 44 N. H. 227, 234; Comstock v. Smith, 26 Mich. 306, 312; In re Goods of Cadge, L. R. 1 Prob. & Div. 543.

SAME—INTERPRETATION OF DOCUMENTS.

301. In certain cases where the language or subject of a written instrument requires explanation to make its meaning or application clear, oral evidence will be allowed.

Technical Language—Signs and Abbreviations.

It may be that in the reading of a document the language or expressions used are such as to leave it doubtful exactly what is meant. In such case it is allowable to introduce evidence to throw light on the meaning of the parties. If, for instance, the language used is technical, and there are signs or abbreviations employed, they may be explained.[141]

Subject-Matter Obscure.

Testimony as to the nature of the subject-matter referred to in a document, so as to enlighten the court in respect to it, may be given. It very frequently happens that the language of a contract leaves it uncertain to just what the parties referred, and it is impossible for the court to enforce its provisions, or to compute damages under it, without some explanation. In such cases resort to testimony of oral statements and conversations must be had.[142] Such facts are referred to by Stephen as "the circumstances of the case." [143]

[141] Thus, in Quigley v. De Haas, 98 Pa. 292, the contract provided that certain dams were to be built "in a good and substantial manner, as flood dams should be built in such streams, cribbed, sparred, puddled-ditched, calked, and graveled." Oral evidence was admitted as to the understanding of the parties as to the meaning of this. The court says (page 299): "To us it seems obvious that, in order to make this intelligible to a jury, some explanation was necessary, either from experts or from the understanding of the parties expressed at the time of the making of the contract; but of these two methods of arriving at the meaning of this agreement the latter was the better, as being the interpretation given to it by those most interested; hence the one which would be most likely to express their intention." See, also, Kell v. Charmer, 23 Beav. 195; Gardiner v. McDonogh, 147 Cal. 313, 81 Pac. 964; Morrison Mfg. Co. v. Bryson, 129 Iowa, 645, 103 N. W. 1016.

[142] In Keller v. Webb, 126 Mass. 393, A. sued X. for damages on a contract to purchase 600 casks of black lead at a price per 100

[143] Steph. Dig. Ev. art. 91.

Language Uncertain and Indefinite.

It is clearly settled that, if a document is unintelligible, no evidence can be given to show what was intended. If the parties have endeavored to express themselves in writing, and have failed to convey a sensible meaning, the law will not attempt to construct for them, upon evidence of their intention, a sensible document.[144]

Latent Ambiguity.

If there is, however, a real ambiguity in the fact that the language of the instrument, though clear, appears to be applicable to two persons or things, then it is permissible to show by parol evidence what was meant by the person who executed it.[145] This is the case of the so-called "latent ambiguity"; i. e., the ambiguity does not appear upon the surface of the document, but is only brought out where inquiry is made as to its application. In one case a testator devised property to the "American Tract Society," and when it came to carrying out the provisions of the will the executor did not know to whom the property should be given, as it appeared there were two corporations of that name. Parol evidence was allowed to show which one the testator intended to be his beneficiary.[146]

pounds. It was shown that there was no settled meaning in the trade of the word "cask," and that lead was sold in casks of different sizes. Testimony of oral statements between the parties, showing that they agreed that the casks should contain 600 pounds each, was held proper. See, also, Scott v. Neeves, 77 Wis. 305, 311, 45 N. W. 421; Carney v. Hennessey, 77 Conn. 577, 60 Atl. 129.

[144] 1 Greenl. Ev. § 300; Palmer v. Albee, 50 Iowa, 429; Blair v. Security Bank, 103 Va. 762, 50 S. E. 262.

[145] Mayberry v. Beck, 71 Kan. 609, 81 Pac. 191; Cappel v. Weir, 46 Misc. Rep. 441, 92 N. Y. Supp. 365; Hebb v. Welch, 185 Mass. 335, 70 N. E. 440.

[146] Bodman v. American Tract Soc., 9 Allen (Mass.) 447. And see, also, Hinckley v. Thatcher, 139 Mass. 477, 1 N. E. 840, 52 Am. Rep. 719; Doe v. Needs, 2 Mees. & W. 129; Morgan v. Burrows, 45 Wis. 211, 30 Am. Rep. 717; Tilton v. American Bible Soc., 60 N. H. 377, 49 Am. Rep. 321. Where X. contracted to deliver to A. 60 tons of "ware" potatoes, and by the evidence it appeared that "ware" was a term used to designate the best grade of potatoes without regard to variety, it was held there was no latent ambiguity which would make evidence admissible to show that the parties intended "ware" potatoes of "Rogers" variety. Smith v. Jeffryes, 15 Mees, & W. 561.

In the case of an ambiguity of this class, if the extrinsic evidence which has shown it to exist cannot be carried to the extent of showing with reasonable certainty what was intended, the language can be given no effect at all.[147] In cases of this sort, since the fact in issue to which evidence is adduced is the intention of the testator or party who used the ambiguous language, his declarations and statements showing what was in his mind are admissible.[148] Where the language accurately describes only one object or person, and is not equally applicable to the other, no extrinsic evidence can be introduced to show that the latter was meant.[149]

RECEIPTS.

302. A receipt, being the statement in writing of a single party, has never been held to be within the rule; and oral evidence is always admissible to contradict, explain, or modify such a writing.

A receipt or release has never been regarded in the same light, with respect to the integrity of its contents, as a con-

[147] Thus, where the testator bequeathed property, to "my niece Mary Frances Tyrwhitt Drake," and it appeared that he had no niece by that name, but did have a sister-in-law; that he also had a niece Frances Isabella Tyrwhitt Drake; that he had sentiments of regard and affection for both,—it was held that the ambiguity was not explained, and the language was ineffective. Drake v. Drake, 8 H. L. Cas. 172.

[148] Doe v. Hiscocks, 5 Mees. & W. 363, opinion of Lord Abinger, page 368.

[149] Charter v. Charter, L. R. 7 H. L. 364; Tucker v. Seaman's Aid Soc., 7 Metc. (Mass.) 188, 206; Kurtz v. Hibner, 55 Ill. 514, 8 Am. Rep. 665. But see Patch v. White, 117 U. S. 210, 6 Sup. Ct. 617, 710, 29 L. Ed. 860; Riggs v. Myers, 20 Mo. 239; In re Root's Estate, 187 Pa. 118, 40 Atl. 818. In this last case the testator bequeathed "unto my nephew, William Root, one thousand dollars." It appeared that the testator had a nephew, William Root, and that testator's wife also had a nephew named William Root. The court held the evidence inadmissible, on the ground that the words "my nephew" could have only one meaning, yet the testator himself used the words in other cases of bequests as describing nephews of his wife, and it would seem, therefore, that the words were open to explanation upon the inquiry as to what the testator meant.

tract. Receipts, being the acts of single parties, and not being in themselves expressive of the views of the other parties to the transaction, except so far as delivery and acceptance may imply acquiescence in their terms, have been peculiarly liable to misuse. On this account the courts have held that they may always be explained by the introduction of all the testimony as to the facts to which they relate.[150]

But it has been held that a warehouse receipt given for grain is in the nature of a bill of lading or contract, and that it cannot be varied by parol evidence.[151]

[150] Fitzgerald v. Coleman, 114 Ill. App. 25; Devencenzi v. Casselnelli, 28 Nev. 222, 81 Pac. 41; Lynn v. Beam, 141 Ala. 236, 37 South. 515; Seeger v. Boiler Works, 120 Wis. 11, 97 N. W. 485; Komp v. Raymond, 175 N. Y. 102, 67 N. E. 113; Truworthy v. French, 97 Me. 143, 53 Atl. 1005; Ireland v. Spickard, 95 Mo. App. 53, 68 S. W. 748; Robison v. Wolf, 27 Ind. App. 683, 62 N. E. 74. Upon the same theory it has been held that a railroad ticket will not be conclusive as to the obligation between the carrier and the passenger. Pennsylvania Co. v. Loftis, 72 Ohio St. 288, 300, 74 N. E. 179, 182, 106 Am. St. Rep. 597.

[151] Thompson v. Thompson, 78 Minn. 379, 81 N. W. 543. For a criticism on this case, see 13 Harvard Law Rev. 681.

CHAPTER XV.

DEMURRERS TO EVIDENCE.

303. Definition.
304. When Joinder Compelled.
305-306. Final Form—Every Inference Deemed Admitted.
307. Admissibility of Evidence Not Determined.

DEFINITION—JOINDER NOT COMPELLED ORIGINALLY.

303. In its original form, the demurrer to evidence seems to have been a means by which, at the instance of either party, the determination of a case could be transferred from the jury to the court, both as to facts and law, provided the other party joined in the demurrer.

The subject of the demurrer to evidence is one about which there has been considerable misconception. The practice as to its use has not been well defined and certain; and, while it is mentioned in the cases quite frequently, we find little about it in the text-books.[1] It was never a necessary nor even a very useful piece of legal procedure, and, in its final shape, became so dangerous that its use was practically abandoned. It seems to be clear that at one time this form of demurrer was favorably regarded by the courts, as a method by which either party could withdraw from the consideration of the jury the evidence submitted, and have its effect determined by the court, both in respect to the inferences of fact to be drawn from it and to its sufficiency in law.[2]

[1] Stephen, Greenleaf, Taylor, and Best do not refer to the subject at all; while Underhill (Ev. par. 372), apparently entirely misconceives the character of such a demurrer.

[2] Prior of Tikeford v. Prior of Caldwel (1456) Y. B. 34 Hen. VI. p. 36, pl. 7. The plaintiff brought an action for rent against the defendant, and sought to establish his right by prescription. He showed in evidence a deed whereby a former Prior of Caldwel granted an annual rent of 20 shillings to the plaintiff's predecessor, which deed bore the date 1242. The defendant sought to demur to the evidence, saying: "And so we ask that you will record the evidence,

WHEN JOINDER COMPELLED.

304. The courts originally held that joinder in demurrer would not be compelled, but later the rule was laid down that, where the evidence was definite and certain, joinder would be compelled.

Under the early theory of the demurrer, the court, to the fullest extent, occupied the position of the jury in the consideration of the evidence and no intendment was made in favor of the inferences of fact claimed by the party whose evidence was demurred to; hence it was thought unfair to deprive a party of the right to have the jury draw those inferences It required the acquiescence of both parties to give the demurrer any effect. It was conceived to be quite possible that the party whose evidence was demurred to should prefer to have the verdict of the jury to the opinion of the court as to the inferences to be drawn from the evidence, and under the early practice the court refused to deprive him of this opportunity. If he was willing to submit the matter to the court, he could do so by joining in the demurrer, but this the courts would not compel. In certain cases, however, it was seen that the evidence was so definite and certain that but a single inference of fact could be drawn; in such cases the court felt that it was no injustice to compel a joinder in demurrer, and accordingly modified the rule to this extent.

Evidence Consisting of Matter in Writing.

We find, for example, that it is laid down in some of the early cases that, where the plaintiff, for his evidence, introduces a matter in writing, and the defendant demurs, there the plaintiff will be compelled to join in the demurrer. The theory is that the writing is of such a definite character that the court can determine its effect as well as the jury. It is not clear whether or not the courts went to the length of holding that questions of fact, as well as questions of law, arising upon a writing, would be considered. It is probable, however, that

and that then the jury be discharged, and we will put the said matter in your judgment." The plaintiff, however, refused to join in the demurrer, and accordingly the matter was left to the jury.

a distinction was not clearly drawn, and that the feature of certainty about written evidence was considered sufficient to justify the court in determining its entire effect.[3]

FINAL FORM—EVERY INFERENCE DEEMED ADMITTED.

305. The operation of the demurrer was made more and more severe against the party demurring until, in its final shape, it was held that all facts against him for which there was any inference from the evidence would be deemed admitted.

The courts gradually narrowed the scope of the demurrer as they grew to look more unfavorably upon it, and finally laid down the rule as above stated. This was practically admitting the adversary's case, and was the death blow to the use of demurrers to evidence. This position was not reached without an intermediate stage. As preliminary to this doctrine, the court first took the position that, on a demurrer to the evidence, they would consider that they had the right to find for the party whose evidence was demurred to, unless it was impossible from the facts proved to reach this result.[4] This was

[3] Baker's Case (1600) 5 Coke, 104; Chichester v. Philips, T. Raym. 404; Thurston v. Slatford, 3 Salk. 155.

[4] Cocksedge v. Fanshaw (1779) 1 Doug. 119: A. sued X., a city officer who collected a duty on corn consigned to A., who was a freeman factor of London, by M., who was a nonresident. It was conceded that from time immemorial the duty was paid by nonresidents importing corn into London. The question was whether there was a right on the part of freeman factors to have the duty returned to them. It was shown that there was a usage extending back as far as any one could remember by which the duty was returned. On two successive trials the jury found for the plaintiff. On a third trial the evidence of the usage was the same, and the defendant demurred to the evidence. Lord Mansfield says: "But what is now brought before the court on this demurrer? Not a question whether the evidence was sufficient to satisfy the jury of the fact of the custom, *for, by the demurrer, the defendant admits every fact which the jury could have found upon the evidence.* The only question before the court is whether, supposing the fact to be as the plaintiff contends, and that immemorially, without exception since the time of Richard I., the usage has been for the freeman factors to receive the farthings, such usage could by any possibility

only one step short of the final stage, to wit, that they were bound to find for such party under such circumstances. The case which finally settled the practice in regard to demurrers to evidence was that of Gibson v. Hunter.[5] The extracts from Lord Chief Justice Eyre quoted below show the new interpretation of the demurrer upon evidence, and practically resulted in its discontinuance.[6] It was there held that it was competent

have a legal commencement. * * * The only point now before the court was fully considered upon the second motion for a new trial; and we were all of the opinion that, if supported by immemorial usage, it was impossible for the court to say that the privilege could not have a legal commencement."

[5] (1793) 2 H. Bl. 187. In this case the demurrer and joinder in demurrer are set forth in full, and illustrate the form: "And the said Thomas Gibson and Joseph Johnson say that the aforesaid matters, to the jurors aforesaid, in form aforesaid, shown in evidence by the said Robert Hunter, are not sufficient in law to maintain the said issue within joined on the part of the said Robert Hunter, and that they, the said Thomas Gibson and Joseph Johnson, to the matters aforesaid, in form aforesaid, shown in evidence, have no necessity, nor are they obliged by the law of the land, to answer; and this they are ready to verify; wherefore, for want of sufficient matter in that behalf, shown in evidence to the jury aforesaid, the said Thomas Gibson and Joseph Johnson pray judgment, and that the jury aforesaid may be discharged from giving any verdict in the said issue, and that the said Robert Hunter may be precluded from having his said action against the said Thomas Gibson and Joseph Johnson. And the said Robert Hunter, for that he hath shown sufficient matter in maintenance of the said issue in evidence to the said jurors, which matter the said Thomas Gibson and Joseph Johnson do not deny, nor in any manner answer thereto, prays judgment and his damages, by reason of the premises, to be adjudged to him."

[6] "It is a proceeding by which the judges, whose province it is to answer to all questions of law, are called upon to declare what the law is, shown upon the facts in evidence, analogous to the demurrer uopn facts alleged in pleading. When the jury has ascertained the fact, if a question arises whether the fact thus ascertained maintains the issue joined between the parties, or, in other words, whether the law arising upon the fact (the question of law involved in the issue depending upon the true state of the fact) is in favor of one or other of the parties, that question is for the judge to decide. Ordinarily, he declares to the jury what the law is upon the fact which they find; and then they compound their verdict of the law and fact thus ascertained. But if the party wishes to withdraw from the jury the application of the law to the fact, and all consid-

to the defendant to insist upon the jury being discharged from giving a verdict by demurring to the evidence, and to oblige the plaintiff to join in a demurrer, but that, in so doing, the party demurring must admit the whole matter of fact alleged by his adversary to be true, even though it be uncertainly alleged and doubtfully proved. Under the rule established by this case, a demurrer to the evidence was no better than a demurrer to the pleading, and the practice became obsolete.[7]

eration of what the law is upon the fact, he then demurs in law upon the evidence, and the precise operation of that demurrer is to take from the jury, and to refer to the judge, the application of the law to the fact. In the nature of things, therefore, and reasoning by analogy to other demurrers, and having regard to the distinct functions of judges and of juries, and attending to the state of the proceeding in which the demurrer takes place, the fact is to be first ascertained. The reason for obliging the party offering evidence in writing to join in demurrer applies to the first sort of parol evidence, but it does not apply to parol evidence which is loose and indeterminate, which may be urged with more or less effect to a jury, and least of all will apply to evidence of circumstances, which evidence is meant to operate beyond the proof of the existence of those circumstances, and to conduce to the proof of the existence of other facts. According to Aleyn's report of the case of Wright v. Pindar (Aleyn, 18), which case underwent very serious consideration, it was resolved 'that he that demurs upon the evidence ought to confess the whole matter of fact to be true, and not refer that to the judgment of the court; and if the matter of fact be uncertainly alleged, or that it be doubtful whether it be true or no, because offered to be proved only by presumptions or probabilities, and the other party demurs thereupon, he that alleges this matter cannot join in demurrer with him, but ought to pray the judgment of the court that he may not be admitted to his demurrer, unless he will confess the matter of fact to be true.' It seems to follow as a necessary conclusion that, if he will confess the matter of fact to be true, there he is to be admitted to his demurrer, and that, if he is admitted, the other party must join in demurrer. * * * And, my Lords, after this explanation of the doctrine of demurrers to evidence, I have very confident expectations that a demurrer like the present will never hereafter find its way into this house."

[7] The following note to the case of Gibson v. Hunter is found in Thayer, Cas. Ev. (2d Ed.) p. 217: "This case seems to have established a new rule of practice in England for a proceeding no longer favored by the courts. Henceforth little was heard there of demurrers upon evidence. In Sewell v. Burdick, 10 App. Cas. 74, 99, Lord Blackburn says of this demurrer and of Chief Justice Eyre's opinion: 'He explains it, and states his very confident expectations (which have been

306. In this country the doctrine as finally laid down by the English courts, and in its most rigid form, has been adopted.[8]

There has been an occasional instance of the demurrer to evidence in several of the states, but there is so seldom any advantage in it, and the purpose it serves can be accomplished by other methods so much more adequate, that its use has been rare. Where the courts have been called upon to consider demurrers of this sort, they have followed the rule laid down in Gibson v. Hunter,[9] and, in their attempts towards discouraging the practice, have even gone to the extent of holding that in case of a demurrer to the evidence, where the question comes up on appeal from the action of the court in overruling it, they will consider not only the evidence in at

justified by the result) that no demurrer on evidence would again be brought before the house.' But, although the rule in Gibson v. Hunter appears to have been a novelty, it was expounded and followed in various jurisdictions in this country as if it were an essential part of the common-law doctrine of demurrers upon evidence; as in Fowle v. Common Council of Alexandria (1826) 11 Wheat. (U. S.) 320, 6 L. Ed. 484; Copeland v. New England Ins. Co. (1839) 22 Pick. (Mass.) 135; and Jones v. Ireland (1856) 4 Iowa, 63."

[8] For a brief resumé of the use of a demurrer as evidence in criminal cases, see 15 Harvard Law Rev. 738, and cases there cited.

[9] 2 H. Bl. 187; Patrick v. Hallett (1806) 1 Johns. (N. Y.) 241: A. against X. on a policy of insurance for total loss of vessel called Peggy. The evidence of the plaintiff showed that the vessel, as far as known, was seaworthy when she left port, but sprang a leak and sunk the day after; that this was not occasioned by storms, violent winds, currents, or accidents of the sea; that the vessel was built of good oak lumber, and only about two years old. The defense was unseaworthiness, and the defendant demurred to the evidence. Lumgston, J., says: "If there were any evidence now from which the jury might have drawn this conclusion, it must be considered as admitted by the demurrer; and that, too, without any scrupulous inquiry whether such inference would be correct or not, for courts should not encourage this practice. It is not only productive of considerable delay and expense (for this action is already in the eighth year of its existence), but, unless all inferences are admitted which a jury might have drawn, judges, instead of confining themselves within their province of deciding on questions of law, will also become triors of every matter of fact." See, also, Colegrove v. Railroad Co. (1859) 20 N. Y. 492, 75 Am. Dec. 418, where the court says: "Upon the conclusion of the plaintiff's testimony, the counsel for the

the time that the demurrer was interposed, but also that which has been put in subsequently.[10]

Other Means of Raising Same Questions as Raised by Demurrer.

The motion for dismissal of the complaint, or to direct a verdict, made by the defendant at the close of the plaintiff's evidence, is, in its effect, similar to the demurrer to the evidence, as the courts finally treated it. Whether these motions take the shape indicated, or that of a request for a ruling that the plaintiff cannot recover, they amount to the same thing.

New York & New Haven Railroad Company offered to demur to the evidence. The court overruled the offer, and the defendants excepted. The defendants have not been in any respect prejudiced by the refusal of the court to permit them to demur to the evidence. The party demurring is bound to admit as true, not only the facts proved by the evidence, but also the facts which the evidence may legally conduce to prove (2 Dunl. Prac. 648); and this is precisely what must be admitted on a motion for nonsuit or for a peremptory direction that a verdict be rendered. The party nonsuited or against whom a verdict is ordered is, upon appeal, entitled to have every doubtful act found in his favor. No benefit other than delay could result to the defendants by the interposition of a demurrer which would not be the result of the motion made by them to dismiss the complaint after the evidence on both sides had closed. The demurrer to evidence has long since gone out of use in this state, and ought not any longer to be regarded as a right upon which an exception can be predicated." Kansas City, Ft. S. & G. R. Co. v. Foster (1888) 39 Kan. 329, 18 Pac. 285; Trout v. Railroad Co. (1873) 23 Grat. (Va.) 619.

[10] Weber v. Railway Co. (1889) 100 Mo. 194, 12 S. W. 804, and 13 S. W. 587, 7 L. R. A. 819, 18 Am. St. Rep. 541. Black, J., says: "The defendant, at the close of the plaintiff's evidence, submitted a demurrer to the evidence, and asked a like instruction at the close of all the evidence, both of which were refused. The demurrer was not only interposed at the close of the plaintiff's evidence, but a like request was made at the close of all the evidence. The defendant, by putting in its evidence, took the chance of aiding the plaintiff's case; but it was not thereby deprived of the right to ask the court to direct a verdict on all of the evidence. When such a demurrer is made and overruled, and the defendant puts in its evidence, this court, in reviewing the ruling, will do so in the light of all of the evidence. If, upon all the evidence, no matter by whom or when offered, there is a case to go to the jury, we do not reverse, though the demurrer to the plaintiff's evidence should have been given, as the case stood when it was interposed."

If overruled, and the action of the court comes up for review, as in the case of demurrer to the evidence, the court considers the whole case.[11]

ADMISSIBILITY OF EVIDENCE NOT DETERMINED.

307. The admissibility of evidence cannot be determined upon a demurrer.

The proper method of questioning the admissibility of evidence is by objections and exceptions; and if the evidence is allowed to go in, upon a demurrer afterwards interposed, it must be considered as true. Of course, if it is irrelevant, and therefore no inference can be drawn from it as to the facts in issue, it will have no effect, even on the demurrer. If, however, it does tend to prove the facts in issue, even though it be inadmissible on the ground of incompetence, on a demurrer it will be considered,[12] and full effect given to it.

[11] Columbia & P. S. R. Co. v. Hawthorne, 144 U. S. 202, 12 Sup. Ct. 591, 36 L. Ed. 405; Grand Trunk R. Co. v. Cummings, 106 U. S. 700, 1 Sup. Ct. 493, 27 L. Ed. 266; Accident Ins. Co. v. Crandal, 120 U. S. 527, 7 Sup. Ct. 685, 30 L. Ed. 740; Northern Pac. R. Co. v. Mares, 123 U. S. 710, 8 Sup. Ct. 321, 31 L. Ed. 296; Robertson v. Perkins, 129 U. S. 233, 9 Sup. Ct. 279, 32 L. Ed. 686; Stephens v. Scott (1890) 43 Kan. 285, 23 Pac. 555.

[12] Bulkeley v. Butler, 2 Barn. & C. 434.

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